SUPREME COURT, U. S.
FILED
FEB 11 1971
ROBERT SEAVER, CLERK

APPENDIX

In the Supreme Court of the United States

No. 70-5276

ALBERT DELANOR MURREL ET AL., PETITIONERS,

v.

BALTIMORE CITY CRIMINAL COURT ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 28, 1971
CERTIORARI GRANTED DECEMBER 20, 1971

INDEX

	Page
Proceedings in the United States Court of Appeals for the Fourth Circuit	1
Opinion, J. Spencer Bell, Circuit Judge, dated June 16, 1964	1
Opinion, Haynsworth, Chief Judge, dated January 4, 1971	16
Judgment	38
Order denying petition for rehearing en banc, filed March 11, 1971	39
Order denying petition to recall mandate and for a rehearing en banc, filed April 30, 1971	41
Separate statement by Senior Circuit Judge Sobeloff	42
Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari	43

ALBERT DELANOR MUREL ET AL., PETITIONERS,

v.

BALTIMORE CITY CRIMINAL COURT ET AL.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN SAS, *Appellant,*

v.

STATE OF MARYLAND, Director of Patuxent Institution, *Appellees.*

ALBERT DELANOR, MUREL, *Appellant,*

v.

STATE OF MARYLAND and Director of Patuxent Institution, *Appellees.*

JAMES C. SHINE, *Appellant,*

v.

STATE OF MARYLAND, Director of Patuxent Institution and the Maryland State Legislature, *Appellees.*

TIMOTHY PATRICK O'CONNOR, *Appellant,*

v.

STATE OF MARYLAND, Director of Patuxent Institution, *Appellees.*

GEORGE L. CRESWELL, *Appellant,*

v.

DIRECTOR, PATUXENT INSTITUTION, *Appellee.*

Nos. 9094, 9095, 9096, 9098, 9143.
United States Court of Appeals Fourth Circuit.

Argued Nov. 6, 1963.

Decided June 16, 1964.

Before BOREMAN and J. SPENCER BELL, Circuit Judges, and CRAVEN, District Judge.

J. SPENCER BELL, Circuit Judge.

This is a consolidated appeal of five petitions for writs of habeas corpus filed by five inmates of Maryland's Patuxent Institution wherein they seek to have the Maryland Defective Delinquent Act, Ann.Code of Md., Article 31B (Supp. 1961) [hereinafter the Act], under which they are confined

declared unconstitutional. The petitions were denied by the district court without the issuance of a writ of habeas corpus or show cause order, without requiring the state to file returns, without appointment of counsel for the indigent petitioners and without argument or hearing.[1]

[1–5] The petitioners allege facts which raise serious questions of a non-frivolous nature which concern the constitutionality of the Act. We hold that statute to be facially constitutional; i.e., it is within the power of the state to segregate from among its lawbreakers a class or category which is dangerous to the public safety and to confine this group for the purpose of treatment or for the purpose of protecting the public from further depredations. We remand the case in order that the district court may appoint counsel, issue a show cause order to the State of Maryland, and permit the filing of an answer to the petition. Thereafter, the district court will accord to each petitioner whatever type hearing may be appropriate in accordance with the standards promulgated in Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), and will then determine whether the statute is being constitutionally applied. In addition to any points which counsel may raise, the court should consider and determine whether the statutory definition of a defective delinquent as applied by the Maryland courts is sufficiently definitive to permit its practical application within constitutional limitations; whether the procedures embodied in the statute are applied in such a manner as to afford due process to the accused within the confrontation requirements of the sixth amendment; whether the proposed objectives of the Act are sufficiently implemented in its actual administration to support its categorization as a civil procedure and justify the elimination of conventional criminal procedural safeguards, Ken-

---

[1] The district court has upheld the constitutionality of the Act in a number of brief memorandum opinions which refer to the opinions of the Maryland Court of Appeals without any attempt independently to analyze the many serious questions of federal constitutional law involved. Brown v. Allen, 344 U.S. 443, 506, 73 S.Ct. 397, 97 L.Ed. 469 (1953). The Maryland court has considered the constitutionality of the Act in more than thirty cases in which all aspects of the issue have been discussed. See especially Blizzard v. State, 218 Md. 384, 147 A.2d 227 (1958); Eggleston v. State, 209 Md. 504, 121 A.2d 698 (1956), and other cases cited herein.

nedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963); whether the interpretation and application of the statutory requirement that a defective delinquent be found to be "an actual danger to society" may within the eighth amendment's prohibition against cruel and unusual punishment include those whose conduct indicates no more than a danger to property rights as distinguished from violence to the person; whether Patuxent does in fact furnish treatment for treatable defective delinquents as distinguished from other lawbreakers which would support the Act under the equal protection clause of the fourteenth amendment. Only when these and any other questions raised by the petitioners at the hearing are answered can the requirements of Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), and Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745 (1963), be satisfied.

The Defective Delinquent Act of Maryland is the end result of a series of studies made in Maryland between 1948 and 1950. In 1947 the Legislature authorized and directed the Governor to appoint a commission consisting of doctors, judges, psychiatrists, psychologists and lawyers to study the problems of medico-legal psychiatry raised by recidivism. On December 28, 1948, the commission completed its work and submitted a report.[2]

Meanwhile, the Maryland Board of Correction had appointed a special advisory committee of seven eminent psychologists and psychiatrists to study the same general problem, and this committee rendered its report in January 1949. Ultimately, the two groups made a joint recommendation that a new institution should be set up for "criminal mental and emotional defectives", such institution to include a unit to function as a diagnostic clinic. It further recommended an indeterminate sentence law for criminal

---

[2] The history and objectives of the statute are to be found in Research Report No. 29, Research Division of the Legislative Council of Maryland (December 1959). See also: Report of the Commission to Study and Re-Evaluate Patuxent Institution, Legislative Council of the General Assembly of Maryland (January 25, 1961); Report of the Commission to Study Medico-Legal Psychiatry submitted to Governor William Preston Lane, Jr., and the Maryland General Assembly, December 28, 1948; Address on Defective Delinquency, Honorable Jerome Robinson, House of Delegates of Maryland, Delivered to the General Assembly of the Council of State Governments, December 5, 1958.

defectives to fulfill the purposes of the new institution. Thereafter, the Legislative Council of Maryland appointed a Committee on Medico-Legal Procedure, charged with the responsibility of making a study of the joint recommendations of the commission and the committee, and of drafting the proposed legislation. In 1951, the bill prepared by this committee was passed by the Legislature with a few minor amendments as the Defective Delinquent Act of Maryland and codified as Article 31B of the Annotated Code of Maryland (1951).

The first four sections of the Act provide for the establishment of the Patuxent Institution, the composition of its staff and its general administrative organization. It requires that the Director be a psychiatrist of at least five years experience in practice or teaching. Two of the Associate Directors must be psychiatrists with at least three years experience. An operating staff of psychiatrists, social workers, psychologists and sociologists is provided to operate the diagnostic clinic and to provide the treatment for the inmates of Patuxent.

Section five, the heart of the Act, defines the term defective delinquent as follows:

"DEFECTIVE DELINQUENTS

"§ 5. Defined.

"For the purposes of this article, a defective delinquent shall be defined as an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment."

The remainder of the Act provides, in essence, that persons convicted of specified offenses may be thereafter tried as defective delinquents and if found to be such may be confined for an indeterminate period.

Section 6(a) lists the offenses conviction of which will subject one to trial for being a defective delinquent. It

includes: (1) felonies; (2) serious misdemeanors; (3) crimes of violence; (4) certain sex crimes; and (5) two or more convictions for any offenses or crimes punishable by imprisonment in a Maryland criminal court. These classifications include both felons and rogues, vagabonds and other offenders against property. See, e.g., Reed v. Warden, 212 Md. 645, 129 A.2d 92 (1957) (rogue and vagabond). See generally Brumbaugh, *A New Criminal Code for Maryland?*, 23 Md.L.Rev. 1 (1963).

A convict may be examined for possible defective delinquency upon the request of the Department of Correction, the prosecuting State's Attorney in the criminal case, the convict or his attorney, or the convicting criminal court, "on any knowledge or suspicion of the presence of defective delinquency." Act, Section 6(b). This request may only be made if the convict has been sentenced to or is then serving a criminal sentence in a state penal institution. Act, Section 6(c). The request is filed with the convicting criminal court, which thereafter retains jurisdiction over the defendant. Act, Sections 6(d), (e).

After the examination is ordered, the convict suspected of defective delinquency is transferred to Patuxent Institution and examined by a medical physician, a psychiatrist and a psychologist, who on the basis of their examination and study of the suspected defective delinquent and the circumstances of the originating crime, copies of any probation or other reports about him, and reports as to his social, physical, mental and psychiatric condition and history determine whether the suspected person is or is not a defective delinquent. Act, Section 7(a).

[6–9] If the institutional report states that the suspected person is a defective delinquent, he is brought before the criminal court which sentenced him and is entitled to counsel of his choice and a jury trial. The right to speedy trial under the sixth amendment and Article 21 of the Maryland Declaration of Rights does not apply. McCloskey v. Director, 230 Md. 635, 187 A.2d 833 (1963). At the defective delinquency determination hearing, the state has the burden to establish, by a preponderance of the evidence, and not beyond a reasonable doubt, that the criminal is a defective delinquent. Purks v. Director, 226 Md. 43, 171 A.2d 726 (1961); Blizzard v. State, 218 Md. 384, 147 A.2d 227 (1958).

If a jury is prayed, the jury is judge of the fact only and not of law and fact, as in criminal cases under the Maryland Constitution, Article 15, Section 5. Blizzard v. State, supra. The defendant may not argue law to the jury, as in criminal cases. Purks v. Director, supra.

[10–12] The state's evidence at the hearing is essentially that of expert witnesses, whose "expert findings and conclusions are to be accorded very serious consideration, particularly in a case such as this one, when the trial court almost necessarily must rely to a considerable degree on the opinions of expert witnesses." Palmer v. State, 215 Md. 142, 152, 137 A.2d 119, 125 (1957). See Purks v. State, 226 Md. 43, 171 A.2d 726 (1961). The institutional experts who testify for the state are not in a patient-physician relationship with the criminal and may testify as to matters learned from the criminal in interviews and tests, even if the same concerns prior criminal offenses and convictions and admissions of prior antisocial conduct. Simmons v. Director, 227 Md. 661, 177 A.2d 409 (1962); McDonough v. Director, 229 Md. 626, 183 A.2d 368 (1962); Purks v. State, supra. Extensive hearsay regarding the past social, physical, mental and psychiatric and criminal condition and history is admitted at the hearing over objection, since it is deemed that the Act requires the introduction of the same and that the purpose of the law would be defeated unless evidence of antecedent conduct is presented upon which to establish the propensity toward criminal activity. Simmons v. Director, supra; Fairbanks v. Director, 226 Md. 661, 173 A.2d 913 (1961).

[13] The psychiatrist of the criminal's own choice, which must be furnished him by the state upon request, is not in the position of a medical expert in an adversary proceeding. He is considered to be "independent." He is required to submit a written report of his examination and findings to the court for consideration by the trier of fact. The defendant has no control over the admission of the report of this independent psychiatrist and the physician-patient relationship does not apply. Simmons v. Director, supra.

[14] Defendant's counsel has access to the records and reports of Patuxent (and of the "independent" psychiatrist) which, presumably, he can put into evidence just as

can the state. Act, Section 8. The defendant also has discovery procedures available to him pursuant to the Maryland Rules of Civil Procedure. Purks v. State, 226 Md. 43, 171 A.2d 726 (1961).

[15] At a determination hearing the sole issue is "whether the person is a defective delinquent as defined in § 5." Act, Section 8(c). The trier of fact is precluded from considering whether treatment will aid defendant and whether any is available. Purks v. State, 226 Md. 43, 50, 171 A.2d 726 (1961); Queen v. Director, 226 Md. 664, 174 A.2d 351 (1961).

If the defendant is found not to be a defective delinquent, he is returned to the custody of the Department of Correction under his original criminal sentence, with credit for time spent in Patuxent and credit for behavior at Patuxent pursuant to the provisions of the state criminal code. Act, Section 9(a); Ann.Code of Md., Article 27, Section 688 (Supp.1962).

[16] If the defendant is found to be a defective delinquent, the court is required to commit him to the Patuxent Institution, "for an indeterminate period without either maximum or minimum limits" and the sentence for the originating crime is suspended. Act, Section 9(b). The defective delinquent convict can be incarcerated at Patuxent Institution after his originating criminal sentence has expired, the purpose of his confinement being not to punish, but to receive "such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment." Act, Section 5. If he should escape this confinement, even if his originating criminal sentence has expired, he is guilty of the crime of escape under the provisions of the criminal code, Ann. Code of Md., Article 27, Section 139 (Supp.1963). See McCloskey v. Director, 230 Md. 635, 187 A.2d 833 (1963); Caparella v. State, 214 Md. 355, 135 A.2d 311 (1957).

During incarceration at Patuxent, the Institutional Board of Review may request the original criminal court to reinstate and reimpose the original criminal sentence upon the defective delinquent, who is then thereafter imprisoned in a penal institution, though he is still a defective delinquent. Act, Section 13(d).

Any person in the custody of the Patuxent Institution

may be transferred by administrative decision, without a hearing, to the Department of Correction for imprisonment. Act, Section 16(d). This administrative transfer to a penal institution for imprisonment may take place regardless of whether the originating criminal sentence has expired. A convict sentenced to a determinate criminal sentence could, after defective delinquency determination, spend the rest of his life in the penitentiary.

During Patuxent confinement, the defective delinquent is subject to the term of his suspended original criminal sentence, and if released prior to its expiration, may be required to serve the remainder of that sentence. Act, Sections 10(a), 13(f).

While it is clear that a Patuxent inmate is subject to immediate and actual physical confinement without maximum or minimum limits, there is no requirement that he be given treatment unless the same is "appropriate." Act, Section 5. See Purks v. State, 226 Md. 43, 171 A.2d 726 (1961).

The Institutional Board of Review is required to review and re-examine each defective delinquent annually, utilizing examination procedures used in the first determination, and make a recommendation for the future status and treatment of each inmate so reviewed. Act, Section 13(b).

After a defective delinquent has been confined for two-thirds of his original criminal sentence or for a period of two years, whichever is longer, he may file a petition for redetermination of his defective delinquency. Act, Section 10(a). If the inmate is found not to be a defective delinquent, the court may discharge him from confinement or commit him under his original criminal sentence with credit for time spent at Patuxent and credit for behavior at Patuxent pursuant to the provisions of the criminal code. Act, Section 10(a); Ann.Code of Md., Article 27, Section 688 (Supp.1962). If the inmate is found to be a defective delinquent, excepting his application for leave to appeal, he is denied further petitions for review until intervals of not less than three years have elapsed. Act, Section 10(b).

[17] The Act expressly saves the writ of habeas corpus to the defective delinquent, the Act, Section 10(c), who also has a post conviction remedy pursuant to the criminal code, Ann.Code of Md., Article 27, § 645A (Supp.1959). In neither proceeding can the defective delinquent raise the

question of his defective delinquency on the merits. See Brown v. Director, 224 Md. 635, 165 A.2d 895 (1960), cert. denied, 365 U.S. 859, 81 S.Ct. 830, 5 L.Ed.2d 825 (1961).

The State's brief explains the objectives of the Act: "The Maryland Defective Delinquency Act is expressly designed to apply to that borderline group of individuals who, though found to be legally sane, are mental or emotional defectives, or both. Under the Act, these individuals adjudged defective delinquents, would be incarcerated not for the purpose of punishment or deterrence, but for treatment and for the protection of society during the period that they were undergoing such treatment."

It is obvious, however, from the statistics to date, that the justification for the Act may not rest solely or even primarily, on the theory that all defective delinquents will receive treatment or that the majority of the inmates who do will be greatly benefitted or cured by treatment. Certainly this is true for the foreseeable future unless unanticipated increases in staff and break throughs in the science of psychiatry make great changes in the amount and efficacy of diagnosis and treatment possible. Many of the inmates will, therefore, in all likelihood, be confined for life on the premise that they are untreatable or incurable but, nevertheless, too dangerous either to life or to property to be released in a free society.[3]

The petitioners attack the Act on several constitutional grounds. First it is contended that the definition of the defective delinquent as set forth in the statute is too vague both as to the class of persons who fall within the Act and the applicable tests to ascertain guilt to constitute valid legislation.

[18, 19] We cannot agree that the statutory definition upon its face is unconstitutional. The subject matter of the

---

[3] Report of Commission to Study and Re-evaluate Patuxent Institution, Legislative Council of the General Assembly of Maryland (January 25, 1961). See the report of The Committee of the American Psychiatric Association on Patuxent Institution appended to the commission report at page 49 wherein the committee said:

"From the standpoint of social policy, the Defective Delinquent Law is primarily concerned with the protection of society, secondarily with the rehabilitation of antisocial persons by means now developed by psychiatry, psychology and the social sciences."

statute—the health, welfare and safety of the people of Maryland—is within the area of the police power of the legislature. This being true, only if the Act has not real or substantial relation to that objective—or is palpably and patently an invasion of the individual's constitutional rights —may the courts strike down the Act. Jacobson v. Massachusetts, 197 U.S. 11, 31, 25 S.Ct. 358, 49 L.Ed. 643 (1905). In Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 60 S.Ct. 523, 84 L.Ed. 744 (1940), the appellant had filed a writ of prohibition to prevent the probate judge from trying him as a "Psychopathic Personality" under the Minnesota Act.[4] The Minnesota Appellate Court had defined the Act to apply to persons who by an habitual course of misconduct showed an utter lack of power to control their sexual impulses and hence were likely to attack others or otherwise inflict injury. In upholding the statute, as construed by the state court, Chief Justice Hughes held that there was a rational basis for the class selected by the legislature; that the definition was not so vague or indefinite as to constitute invalid legislation and, therefore, the Act was constitutional upon its face. While psychiatrists no longer approve the term psychopath as a definitive medical term, we note that the definition adopted by the Minnesota Appellate Court and approved by the Supreme Court was not dependent upon the medical acceptability of the term psychopath. It is obvious that the Maryland statutory definition was carefully drawn to conform to the definition approved by the Court in the Minnesota case.

[20] The Maryland Court of Appeals, however, has construed the statutory definition to include mentally deficient persons and/or psychopaths who by persistent aggravated anti-social or criminal behavior have clearly demonstrated themselves to be such an actual danger to society as to require confinement. Palmer v. State, 215 Md. 142, 137 A.2d 119, 122 (1957). Whether or not the court's interpretation of the words "emotionally unbalanced" as used in the statutory definition to include "psychopaths"—a term which is not determinable by medical standards alone—has

---

[4] The District of Columbia and approximately 20 states have similar statutes. But see: Ch. 10, *The Sexual Psychopath and the Law*, The Mentally Disabled And The Law (Lindman and McIntyre ed. 1961) for criticism of many of these Acts.

rendered the definition too vague to be constitutionally acceptable is a matter which may not be determined without the aid of expert testimony not available on this record. Counsel for the petitioners offer the expert writings of members of the Patuxent staff to show that "emotional unbalance" is such a quantitatively and qualitatively inaccurate term that any person who seeks to apply the definition is forced to depend upon an individual interpretation of the evidence of past antisocial and criminal conduct. Again it is the district court which must provide a record which will offer a solution to this issue.

[21, 22] We must also reject the petitioners' contention that the Act upon its face violates the equal protection clause of the fourteenth amendment. The preoccupation of society with the problems of recidivism and rehabilitation, which show no signs of solution by conventional penological methods, strongly support the efforts of Maryland to seek a new approach. The problem furnishes a rational basis for the legislature's efforts to set apart a group of convicted felons—who were "demonstrably dangerous to society unless cured of their criminal propensities." Eggleston v. State, 209 Md. 104, 121 A.2d 698 (1956). In Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 60 S.Ct. 523 (1940), the Court answered this contention as follows:

> "The question, however, is whether the legislature could constitutionally make a class of the group it did select. That is, whether there is any rational basis for such a selection. We see no reason for doubt upon this point. Whether the legislature could have gone farther is not the question. The class it did select is identified by the state court in terms which clearly show that the persons within the class constitute a dangerous element in the community which the legislature in its discretion could put under appropriate control. As we have often said, the legislature is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be the clearest. If the law 'presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.'" 270 U.S. at 274–75, 60 S.Ct. at 526.

See also Buck v. Bell, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927), where Mr. Justice Holmes writing, the Court upheld the constitutionality of the Virginia Sterilization Law. In rejecting the equal protection argument he said:

> "But the answer is that the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow." 274 U.S. at 208, 47 S.Ct. at 585.

[23] The petitioners also contend that the Act does not provide them with a fair trial in that it denies them procedural due process. An examination of the trial and hearing provisions of the Act can leave no doubt that it places around the accused more procedural safeguards than any of the Acts of a similar nature which have been upheld by the courts against this attack. Not until the convicted felon has been examined and diagnosed by the Patuxent Clinic is he liable to trial under the statute as a defective delinquent. He is entitled to a jury trial with special finding. He must be allowed counsel of his own choice or furnished counsel. He has the power to summon witnesses. He is entitled to be furnished a psychiatrist who is independent of Patuxent. While the sentence prescribed for the defective delinquent is fixed by the law as an indeterminate sentence, it nevertheless requires yearly administrative review of his record by the Patuxent staff and an opportunity to the petitioner at fixed times to have a judicial review of his status. The procedural protection here furnished exceeds that provided in either the Minnesota Psychopathic Personality Statute, or the Virginia Sterilization Act, both of which were upheld by the Supreme Court. In the Minnesota case the Court pointed out that the statute provided for notice and hearing, the right to counsel and to witnesses, and impartial experts to assist in the examination and appeal. There too, the penalty was indeterminate confinement but the Court felt that the right to petition for release was adequate procedural protection for this provision of the Act.

[24, 25] But petitioners attack the trial provided in the Maryland Act on the ground that it departs from the common law rules of evidence in permitting the experts to

testify over objection to hearsay matters either admitted by the petitioner during his clinical examination at Patuxent or collected by the staff from the petitioner's school records or indeed from any source deemed of relevance by the psychiatrist in forming his opinion. They also question the fairness of permitting the experts to express their opinion on the ultimate issue before the jury; i.e., whether the petitioner is a defective delinquent within the meaning of the statute. The petitioners also complain that the statute provides that the state must carry its case only by the greater weight of the evidence. The answer to all of these objections is that with respect to state action repeated decisions of the Supreme Court have put it beyond the range of further debate that the "due process" clause of the fourteenth amendment has not the effect of imposing upon the states any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal are not interfered with. Frank v. Mangum, 237 U.S. 309, 340, 35 S.Ct. 582, 59 L.Ed. 969 (1915). Thus the Supreme Court has ruled that trial by jury may, by a state, be modified or abolished altogether; so also compulsory incrimination, Twining v. New Jersey, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97 (1908), and double jeopardy, Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937). Care, however, should be taken to read these cases in the light of the Court's more recent decisions beginning with Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925), in which the Court has broadened the concept of liberty contained in the fourteenth amendment and thus has brought to bear on the states the constitutional requirement of fundamental fairness contained in many sections of the Bill of Rights not theretofore thought to apply to them. See Gideon v. Wainwright, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), and at pages 345–47, 83 S.Ct. at pages 797–98, where Mr. Justice Douglas in a concurring opinion reviews the history of this process. See also Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962) and Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d. 1081 (1961).

[26, 27] It would, therefore, appear that the Act upon its face provides adequate procedural safeguards; indeed it throws around the accused many safeguards not ordinarily

found in so-called civil proceedings. By examining the records of the actual trials of the petitioners, the district court can determine whether in application these safeguards result in basic fairness of procedure imposed upon the state by the fourteenth amendment. We are not here speaking only of the "perfection of the machinery for correction" which may be referred to as procedural due process. Fay v. Noia, 372 U.S. 391, 421, 83 S.Ct. 822, 839 (1963); Cf. Moore v. Dempsey, 261 U.S. 86, 90–91, 43 S.Ct. 265, 67 L.Ed. 543 (1923).[5]

Finally, we again caution that we are here concerned only with the constitutionality of the Maryland statute upon its face. We are fully aware of the dangers inherent in the application of this new and radical approach in the present state of medico-legal knowledge of the problems of crime and recidivism. In its essence, the statute rejects the age old concept that every legally sane person possesses in equal degree the free will to choose between doing right and doing wrong. Instead, it substitutes the concept that there is a category of legally sane persons who by reason of mental or emotional deficiencies "evidence a propensity toward criminal activity," which they are incapable of controlling.[6] For those in the category who are treatable it would substitute psychiatric treatment for punishment in the conventional sense and would free them from confinement, not when they have "paid their debt to society," but when they have been sufficiently cured to make it reasonably safe to release them. With this humanitarian and progressive approach to the problem no person who has deplored the inadequacies of conventional penological practices can complain. But a statute though "fair on its face and impartial in appearance" may be fraught with the possibility of abuse in that if not administered in the spirit in which

---

[5] Insofar as the basic constitutional rights of the parties to due process are concerned, the arguments as to whether the Act is civil or penal in nature are futile exercises in semantics. An Act which deprives sane men of their liberty by confining them under severe discipline with or without treatment requires a basic fairness of procedure and substance—"implicit in the concept of ordered liberty"—to comport with the guaranties of our National Constitution. By these standards, the Supreme Court reviewed the Minnesota statute which concededly is as civil in nature as the Maryland statute.

[6] GLUECK, LAW AND PSYCHIATRY (1962).

it is conceived it can become a mere device for warehousing the obnoxious and antisocial elements of society.[7] Many of the inmates in Patuxent are there by reason of offenses against property rights. Many jurists and laymen would seriously question the wisdom of the practice of indefinitely confining young men under these circumstances. Deficiencies in staff, facilities, and finances would undermine the efficacy of the Institution and the justification for the law, and ultimately the constitutionality of its application.

[28] The petitions should be reconsidered by the district court and since they are pro se petitions they should be construed liberally. Darr v. Burford, 339 U.S. 200, 203–04, 70 S.Ct. 587, 94 L.Ed. 761 (1950).

The creation of a non-medically determinable category of persons who may be confined for indeterminate periods by a civil proceeding is so serious a departure from traditional concepts of justice that it deserves a critical analysis on the broadest of terms after a careful factual development of its present operation. Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745 (1963).

Remanded.

---

[7] The 1961 Report of the Commission to Study and Re-Evaluate Patuxent Institution raises many of the problems which must be frequently reviewed while sufficient experience accumulates to make a final judgment.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13,415

CHARLES MASON TIPPETT, *Appellant*,

v.

STATE OF MARYLAND, and Director of Patuxent Institution, *Appellees*.

No. 13,421

ALBERT DELANOR MUREL, *Appellant*,

v.

BALTIMORE CITY CRIMINAL COURT, and Director of Patuxent Institution, State of Maryland, *Appellees*.

No. 13,426

ROBERT HAYES, JR., *Appellant*,

v.

HAROLD M. BOSLOW, M.D., Director, Patuxent Institution, *Appellee*.

No. 13,433

WILLIAM R. MONROE, *Appellant*,

v.

DIRECTOR OF THE PATUXENT INSTITUTION, and State of Maryland, *Appellees*.

No. 13,434

BRADLEY ARLINGTON AVEY, *Appellant*,

v.

STATE OF MARYLAND, Harold M. Boslow, as Director of Patuxent Institution, and Vernon L. Peppersack, as Commissioner, State Department of Corrections, *Appellees*.

No. 13,441

GEORGE L. CRESWELL, *Appellant*,

v.

DIRECTOR, PATUXENT INSTITUTION, *Appellee*.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE. R. DORSEY WATKINS, DISTRICT JUDGE.

(Argued May 8, 1972. Decided January 4, 1971).
Before HAYNSWORTH, Chief Judge, SOBELOFF, and BUTZNER, Circuit Judges.

Karl Feissner and Andrew E. Greenwald (Court-assigned counsel) [William L. Kaplan, Thomas P. Smith, Fred R. Joseph; and Feissner, Kaplan and Smith on brief] for Appellants, and Alfred J. O'Ferrall, III, Assistant Attorney General of Maryland, (Francis B. Burch, Attorney General of Maryland, and Edward F. Borgerding, Assistant Attorney General of Maryland, on brief) for Appellees, and Curtis R. Reitz (Richard L. Bazelon on brief) for Amicus Curiae.

HAYNSWORTH, Chief Judge:

These consolidated appeals arise from a previous order of this Court [1] in which we directed the District Court to determine, after a full hearing, numerous questions involving the application of the Maryland Defective Delinquents Act.[2] Following an extensive series of hearings, and on consideration of the record of equally thorough proceedings in the state courts,[3] the District Court dismissed the petitions.

The petitioners contend that, as applied, the Act is constitutionally deficient in the following respects:

1. The definition of defective delinquency is too vague to be susceptible to any objective medical or legal application, and in fact defective delinquency is not determined on an objective basis;

2. The examination procedures offend due process in that (a) a person suspected of being a defective delinquent is not given prior notice of the request for examination, nor is he given an opportunity to contest the order referring him for examination; (b) he is required to submit to personal interviews with institu-

[1] Sas v. State of Maryland, 4 Cir., 334 F.2d 506. The original petitioner is no longer a party to these proceedings. He was found to have responded favorably to treatment and was released from confinement. He did not join in this appeal.

[2] Annotated Code of Maryland, Article 31B.

[3] See Director of Patuxent Institution v. Daniels, 243 Md. 16, 221 A.2d 397.

tional psychiatrists, with a resulting risk of self-incrimination; and (c) he is not allowed to have an attorney present during the examination process;

3. The procedures for judicial determination of defective delinquency offend due process in that (a) hearsay evidence is admitted; (b) the state is not required to prove beyond a reasonable doubt, but only by a preponderance of the evidence, that the subject is a defective delinquent; (c) the indeterminate period of confinement, substituted for a previously imposed sentence of imprisonment for a term of years when a person is found to be a defective delinquent, violates the constitutional protection against double jeopardy;

4. The Act violates the prohibition against cruel and unusual punishment by including within its scope those persons whose conduct indicates a danger only to property rather than danger of violence to the person; and

5. Patuxent Institution lacks sufficient staff, facilities and finances to effectuate the purposes of the Act and, in consequence of these deficiencies, has failed to provide treatment as contemplated by the Act, thus depriving it of its character as a mental health institution and rendering it no more than a warehouse for obnoxious and antisocial elements of society.

[1] The District Court considered each of these contentions in detail and found that the present application of the Act does not operate to deny any of the petitioners' constitutional rights. We affirm on the District Court's opinion. Sas v. State of Maryland, D.Md., 295 F.Supp. 389.

The Defective Delinquents Act is the outgrowth of Maryland's dissatisfaction with the result of more conventional methods of dealing with habitual criminal offenders. In 1948 and 1949 two special commissions, one consisting of lawyers, judges, physicians, psychiatrists and psychologists appointed by the Governor, and the other made up of psychiatrists and psychologists appointed by the Board of Corrections, made studies of the medical and legal aspects of recidivism in an effort to suggest a more effective method of coping with the problem. The result of the studies was a joint report recommending that a separate institution be

established for "criminal mental and emotional defectives" with a diagnostic clinic to determine what persons were susceptible to specialized treatment in the institution. In 1951 the recommendations were adopted by the legislature. Patuxent Institution was established to house and care for defective delinquents, defined by the statute as including any

> "individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment." [4]

The Act sets up a comprehensive scheme for referral, examination, commitment, treatment and release of persons suspected of being defective delinquents. A request for examination may be made only after the imposition of an active prison sentence upon a defendant's conviction of one of several enumerated classes of criminal offenses.[5] Examinations may be requested by the prosecutor, the Department of Correction, the trial judge on his own motion, or the defendant himself.[6] An order referring a defendant for examination is not reviewable. Once at Patuxent, the prisoner is examined by a physician, a psychiatrist and a psychologist, who are required to furnish a report to the committing court stating whether or not they believe him to be a defective delinquent. If the report is negative, he is returned to a penal institution to complete service of his sentence, with full credit for the time spent at Patuxent.[7] If the examiners believe him to be a defective delinquent, he is afforded a full and prompt judicial hearing, at which he is entitled to the assistance of retained or appointed

---

[4] Annotated Code of Maryland, Article 31B § 5.

[5] Id., § 6(a).

[6] Id., § 6(b).

[7] Id., § 7(a).

counsel[8] and to receive a trial by jury.[9] He is allowed full access to all records, reports and papers in the possession of the institution or the court, including the report made by the independent, private psychiatrist who, on the prisoner's request, may be appointed to examine him at the expense of the state.[10] If he is found to be a defective delinquent he is committed to Patuxent for an indeterminate period, with the right of judicial review of his classification after the expiration of the greater of two years or two-thirds of his original sentence, and thereafter at three year intervals. Appellate review of any court order subsequent to the original referral for examination is provided.[11]

In addition to periodic judicial determinations, the Act requires review of each inmate's classification by the Institutional Board of Review not less than once each year.

The Board has the power to grant paroles or leaves of absence at any time, or to report to the committing court if it concludes that an inmate need no longer be classified as a defective delinquent.[12] If the court concludes that his condition is so improved that confinement at Patuxent is no longer required, it may order him returned to the Department of Correction to complete service of the original sentence with full credit for the time spent at Patuxent, order him released conditionally on parole or leave of absence,

---

[8] Id., § 8(a), (b).

[9] Id., § 8(e).

[10] Id., §§ 7(b), 8(b).

[11] Id., §§ 11, 11A. Although the time limitation on initial judicial reappraisal of an inmate's status is of considerable length in the case of a long original sentence, the writ of habeas corpus is available without time limitations, and it is expressly preserved to inmates of Patuxent by § 10(c) of the Act. In addition, the Board of Review may seek judicial reappraisal of an inmate's status at any time, pursuant to § 13(f).

[12] Id., § 13(b), (d). Leaves of absence can be tailored by the Board of Review to meet individual needs. The leaves may range in length from a few days holiday leave, through longer periods designed to provide a basis for determining whether the inmate's social interactions have significantly improved, to a full year's leave to permit an inmate to live and work as a normal member of society, but subject to observation and supervision. In addition, a "live-in work-out" program has been devised to aid some inmates in coping with the transition between inmate status and full release. A "halfway house" has also been established to assist in the transition.

or order him released unconditionally, whether or not the original sentence would otherwise still be in effect.[13]

[2] Critical to the appellants' argument is the premise that, without regard to the terminology used, Patuxent is in fact a penal institution, and the proceedings for determination of defective delinquency are equivalent in practice to criminal prosecutions. Almost without exception, their various contentions rest on this foundation.[14] The District Court's rejection of this basic contention, which we affirm, of necessity defeats their arguments. As written by the legislature, construed by the courts, and applied by the staff, the Act selects a medically and legally recognizable class of persons for special treatment.[15] Although criminal conduct is necessarily bound up in every case, the inquiry does not focus on particular criminal acts but on the mental and emotional condition of the person thought to be a member of the statutorily defined class. It is that, and no other factor, which ultimately determines his classification and treatment. In this context, the denomination of the

---

[13] Id., § 13(f).

[14] One contention which does not rest on this foundation is the claimed impropriety of including within the statutory class those persons who have demonstrated only a propensity for committing crimes carrying no danger of violence to the person. That question is not properly before us. Although the statute as construed permits this classification, the District Court found as a fact that it is not so applied at the present time. None of these petitioners, nor any other person now confined at Patuxent, was classified as a defective delinquent solely on the basis of a propensity to commit only "property crimes." The staff, as a matter of policy, does not recommend for classification as defective delinquents any such person. To the extent that a propensity to commit "property" crimes as well as a predisposition to violence or threats of violence may have been a factor in the classification of some of the petitioners, we can perceive no reason why the treatment provided at Patuxent should not be as beneficial in combatting that propensity as it is in dealing with more violent manifestations of mental disorder, nor why the state's interest in treating it is any the less legitimate. The question raised by the petitioners need not be resolved unless and until the evaluation policies in effect at Patuxent are changed to make operative the classification of which they complain.

[15] In Schreiber, Indeterminate Therapeutic Incarceration of Dangerous Criminals: Perspectives and Problems, 56 Va.L.R. 602, it is suggested that the statutory definition of "defective delinquent" should be made more specific. Although we recognize the risk of vagueness inherent in the terminology employed, an attempt to make precise legal definitions of medical concepts embodies a risk of over-definition. We do not think that the definition now used is so vague as to offend due process.

proceedings as civil rather than criminal is not a semantic exercise but a factual description of what occurs. The procedural safeguards erected by the statute are adequate to meet present needs and to protect the petitioners' constitutional rights.

In sum, the Act represents an enlightened and progressive experiment aimed at rehabilitating persons whose anti-social activities are occasioned, at least in part, by mental disorders. The present administration of the Act demonstrates a sincere and vigorous attempt to effectuate its policies. By the petitioners' own account, the state has expended to date $28,000,000 for plant and facilities at Patuxent. Legislative appropriations for its operation have continuously increased, not only in absolute terms but also for each inmate and as compared with the appropriations for operating regular penal institutions. Currently the appropriations per inmate are three times the amount allocated to the Reformatory, four times that provided for the House of Correction, and five times the amount allotted for the Penitentiary. Improvements in and expansion of staff, therapeutic facilities, vocational and educational training, and out-patient services continue.[16] There is reason to believe that the effort may prove successful. Based on the figures available from its brief operation, the recidivism rate from Patuxent, which deals with a population composed entirely of confirmed recidivists, is lower than the combined rate for all of the penal institutions in the United States.

We recognize that many problems remain and that there are many areas of possible improvement. For example, it might prove fruitful to permit the independent psychiatrist to participate in the proceedings at an earlier stage than is presently allowed; his participation in staff conferences may be beneficial to the staff and to the inmate he examines. But, in this comparatively new field of medical rehabilitation, experience is more likely than fiat to suggest constructive avenues for change.

Mr. Chief Justice Burger has taken the lead in pleading

---

[16] Presently the staff at Patuxent includes ten psychiatrists, ten psychologists and fourteen social workers for approximately 350 inmates. The total psychiatric staff of all other corretcional institutions in the entire United States is about fifty. See *Schreiber*, supra, note 35 at 607.

for a reformation of our correctional system, which, in general, is woefully deficient in its rehabilitative function. Too many prisoners serve their allotted time and are released into society with the same predisposition to anti-social conduct as they had before their arrests. In all too many instances, imprisonment serves the converse of the rehabilitative purpose, converting good prospects for rehabilitation into hardened criminals. The result, of course, is a grave wrong for those convicts who could be helped by getting help. It is a grave wrong to society, which must suffer their continued depredations when released from prison until they are confined again.[17]

The interests of society and of the prison population demand the sort of innovative reappraisal of our correctional institutions, their practices and procedures, for which the Chief Justice has pled. At the very least, Patuxent is an encouraging example of one kind of approach to a solution of these difficult problems. Time is required to appraise its ultimate effectiveness, but there is firm foundation for hope that it will prove a material and positive step toward the rehabilitation of mental and emotional defectives, and the protection of society from those anti-social defectives who are beyond rehabilitation.

The approach of Maryland's Defective Delinquent Act is essentially a medical approach, but the clear promise it has demonstrated would be withdrawn should it be held, as the petitioners contend, that the diagnostic and treatment processes must be converted into an adversary legal process in which the patient is entitled to all the constitutional protections available to a defendant in a criminal proceeding. It is difficult to imagine anything more stultifying to a psychiatrist, as dependent as he is upon the cooperation of his patient, than the presence of a lawyer objecting to the psychiatrist's questions and advising his client not to answer this question and that. The injection of broad legal restraints into the diagnostic and treatment procedures that would deny Patuxent's substantial prospect for improvement over our earlier practices might well restrain most other experimentation looking toward conversion of

---

[17] See United States v. Chandler, 4 Cir., 393 F.2d 920, 927-929.

our correctional institutions into effective rehabilitating agencies.[18]

The suggestion in the dissenting opinion that counsel be brought into the proceedings to a limited extent at an earlier time, like our similar suggestion with respect to the private psychiatrist, may have merit as one for future trial and experimentation. Its concededly tentative nature, in light of the uncertainties permeating this field of knowledge, however, hardly leads to the conclusion that it presently is an absolute requirement of the due process clause. The question before us is whether the procedures embodied in the statute meet the minimal requirements of the Constitution. In the appraisal of that question, settled notions of the essential elements of fairness play a great part, but the fact that we can conceive of tentative avenues for future trial experimentation to determine their impact upon the fairness of the procedures does not support a conclusion that our hesitant suggestions are already clad in the full regalia of due process.

[3] The burden of persuasion is in the same category. We might all be happier had it been stated in terms of clear and convincing proof rather than in terms of a preponderance of the evidence. However meaningful the distinction may be to us as judges, however, it is greatly to be doubted that a jury's verdict would ever be influenced by the choice of one standard or the other. We all know that juries apply the preponderance standard quite flexibly, depending upon the nature of the case. In any event, in the present state of our knowledge, choice of the standard of proof should be left to the state. A legislative choice of the preponderance standard, the same standard governing civil commitments of mentally ill persons who have no history of criminality, ought not to be held in violation of due process requirements when we have no firm foundation for an evaluation of the practical effects of the choice.

[4] Since the Act's provision for judicial review of a defective delinquent's initial commitment to Patuxent and

---

[18] We do not suggest that our disposition of these cases should be taken as a final and unalterable evaluation of all Constitutional questions which may arise out of the Act's administration. We would not consider ourselves bound by today's decision in a future case if later experience should show serious unfairness in the administration of the Act.

his continued confinement there are adequate, we conclude that the Constitution does not require that the procedures under the Act be treated as if they were criminal proceedings subject to the self-defeating strictures which the Constitution appropriately throws around the shoulders of defendants facing criminal charges in adversary legal proceedings.

Affirmed.

SOBELOFF, Circuit Judge (concurring in part and dissenting in part):

I am enabled to concur in part with my brethren largely because of their explicit statement in footnote 18 that:

> We do not suggest that our disposition of these cases should be taken as a final and unalterable evaluation of all Constitutional questions which may arise out of the Act's administration. We would not consider ourselves bound by today's decision in a future case if later experience should show serious unfairness in the administration of the Act.

This is a wise and necessary reservation and deserves emphasis, for as Judge Bell observed in Sas v. State of Maryland, 334 F.2d 506, 516 (4th Cir. 1964), the Act is "fraught with the possibility of abuse * * * if not administered in the spirit in which it is conceived * *."

One of the issues we should consider open for future evaluation is the adequacy of treatment at Patuxent. Our approval of the Maryland Defective Delinquent Act is grounded partly on the assumption that the state will continue to furnish Patuxent with sufficient funds, personnel and facilities to justify realistic hopes of rehabilitating its inmates. Any future review must appraise not only the general treatment program, but whether the particular prisoner before the court is receiving the benefits of Patuxent's program. It does him no good if there is a program of treatment, but it has been arbitrarily withheld from him.[1]

---

[1] *See* Rouse v. Cameron, 125 U.S.App.D.C. 366, 373 F.2d 451 (1966), and Millard v. Cameron, 125 U.S.App.D.C. 383, 373 F.2d 468 (1966), where Judge

Notwithstanding the District Court's finding that treatment at Patuxent is presently adequate, this remains an undeniably difficult case. The majority dismisses petitioners' serious constitutional challenges by the simple expedient of labeling the defective delinquency proceedings "civil." But the attempt to sidestep constitutional issues by asserting that the process is "noncriminal" was disapproved by this court in *Sas, supra,* as a "futile exercise in semantics" and has been expressly rejected by the Supreme Court as insufficient justification for disregarding the strict safeguards accorded in criminal cases.[2] As that Court recently noted in the context of the juvenile process: "[C]ivil labels and good intentions do not themselves obviate the need for criminal due process safeguards * * *." In re Winship, 397 U.S. 358, 365–366, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970).

The guarantees constitutionally required in criminal prosecutions are dictated by the severity of the sanctions imposed, which may deprive an individual of his liberty. The consequences of commitment under the Patuxent scheme are hardly less onerous. Patuxent inmates are involuntarily confined under maximum security conditions. Some may remain at Patuxent in a prison-like environment for life because they are deemed too dangerous either to life or to property to be released. As the District of Columbia Circuit has aptly noted:

> [W]hen a determination of "dangerousness" will re-

Baselon discussed the constitutional underpinnings of a "right to treatment" when an individual is involuntarily confined on "humane therapeutic" grounds. *See also* Comment, Civil Restraint, Mental Illness, and the Right to Treatment, 77 Yale L.J. 87 (1967).

[2] *See* In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). In Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967), the Court emphasized the irrelevancy of arbitrary labels in dealing with procedures under Colorado's Sex Offender Act. "These commitment proceedings whether denominated civil or criminal are subject both to the Equal Protection Clause * * * and to the Due Process Clause." 386 U.S. at 608, 87 S.Ct. at 1211. The same thought has been stressed in Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968) (the state has an "inescapable duty to vouchsafe due process" in commitment proceedings for the mentally deficient); and in United States ex rel. Gerchman v. Maroney, 355 F.2d 302, 312 (3rd Cir. 1966) ("due process cannot be satisfied by partial or niggardly procedural protections" in proceedings under Pennsylvania's Sex Offender Act).

sult in a deprivation of liberty, no court can afford to ignore the very real constitutional problems surrounding incarceration predicated only upon a supposed propensity to commit criminal acts. Incarceration may not seem "punishment" to the jailors, but it is punishment to the jailed. Cross v. Harris, 135 U.S. App.D.C. 259, 418 F.2d 1095, 1101–1102 (1969).

Although prisoners are entitled to due process protections regardless of the nature of the proceeding, and the Defective Delinquent Act is in many ways indistinguishable from a criminal statute, an unmodified application of the full procedural safeguards afforded in criminal cases may render the Act unworkable. The Maryland act represents an innovative approach appropriate to deal with an identifiable segment of the criminal population, and until the results can be adequately appraised, some flexibility in the procedures employed by the state is justified. While experiments in penology do not warrant suspending constitutional rights, the unique context in which the Act operates may justify some variation in the manner of their application. However, because the Maryland act bears such close resemblance to the criminal process, the state must make the least drastic departure from the safeguards applicable to criminal proceedings as will avoid destruction of the statutory scheme. The means employed to resolve the dilemma must not sacrifice the essentials of the constitutional safeguards, and the burden of justifying any challenged procedure or practice rests upon the state.[3]

I. RIGHT AGAINST SELF-INCRIMINATION

Upon referral to Patuxent, a prisoner is required to submit to a battery of tests and interrogations by the

[3] In essence, the court is required to examine the Act to determine whether "less drastic means" might be employed to effect the objectives of the state. In the First Amendment area, which in our constitutional system is no less fundamental than individual liberty, the Supreme Court has allowed application of a least drastic means test where a compelling state interest is shown. *See* United States v. Robel, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967); Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960). A no more rigorous doctrine is called for in analyzing the adequacy of the procedural safeguards in commitments under this statutory scheme.

social service staff, a psychiatrist and a psychologist. The statute directs the staff to make inquiry into the crime for which the prisoner has been sentenced and the circumstances surrounding the crime. The interviews also focus on any other crimes and antisocial behavior in his past. There is no contention by the state that the disclosures are voluntary.

The history of petitioner Bradley Avey aptly illustrates the consequences of refusal to submit to the examinations. Avey was committed in December 1965 for an evaluation by the staff. For four years he continuously refused to submit to personal interviews on the ground that his right against self-incrimination would be violated. Consequently he never received a hearing on his defective delinquency status and remained in the receiving ward of the Institution.[4] The case presented by petitioner Avey is not an unusual one. The Institution admits that it has a substantial number of inmates who refuse to submit to the interrogation by the medical and social services staff, and whose judicial hearings are delayed until their cooperation can be achieved. The Director of Patuxent states that an inmate's persistent refusal to be examined could indefinitely postpone any judicial hearing, and result in confinement for the rest of his life. The Maryland Court of Appeals has upheld the legality of this practice. State v. Musgrove, 241 Md. 521, 217 A.2d 247, 252 (1966).[5]

---

[4] According to the appellee's brief, p. 23, after the decision of the District Court in this case, Avey was recommended by the Patuxent staff for commitment to Patuxent as a defective delinquent. The record does not disclose whether he finally submitted to interrogation after the adverse decision below or whether the staff proceeded to recommend commitment without his cooperation. In at least one earlier case, the Patuxent staff did recommend an inmate's commitment, despite his consistent refusal to be interviewed. *See* Joint Record Extract, p. 602, Director of Patuxent Institution v. Daniels, 243 Md. 16, 221 A.2d 397 (1966).

Avey's incarceration at Patuxent has not run beyond the original sentence imposed for his underlying criminal conviction. We are thus not faced with a situation where confinement rests solely on a refusal to cooperate. The state would undoubtedly have to bear a heavy burden in justifying extended commitment where there has been no judicial hearing.

[5] The problem of the uncooperative defendant is frequently confronted in psychiatric examinations for competency and criminal responsibility. Sanctions less severe than those imposed at Patuxent have been suggested to induce cooperation. *See* Judicial Conference of the District of Columbia, Report of the

The reluctance of Patuxent inmates to respond to the staff's probing is understandable. Admissions made concerning mental state and past criminal behavior provide significant evidence for the state to use at the judicial hearing on defective delinquency.* The petitioners maintain that they have an absolute right to silence, and cannot be forced to reveal information which may be used against them. But determining defective delinquency involves essentially an inquiry into the state of the inmate's mind. Denied direct access, the state psychiatrists would be relegated to secondhand information in arriving at a diagnosis. In United States v. Albright, 388 F.2d 719 (4th Cir. 1968), this court emphasized the necessity for a government psychiatric examination where the mental condition of a criminal defendant was in issue. It was reasoned that the defendant had waived his right to silence by raising the insanity issue as a defense, but the underlying thrust of the *Albright* opinion was the recognition that a reliable inquiry into the defendant's mental state is possible only with his active cooperation.

With the continuing reservation that this issue is open to further consideration, I agree, for the present, that the

---

Committee on Problems Connected with Mental Examination of the Accused in Criminal Cases, Before Trial 107-18 (1966); Note, Pre-Trial Mental Examination and Commitment: Some Procedural Problems in the District of Columbia, 51 Geo.L.J. 143, 152-56 (1962). I reserve opinion as to the constitutionality of confinement at Patuxent without a hearing where the inmate's original criminal sentence has expired.

* It needs to be emphasized that the prisoner is asked to speak of his past in order to gain an insight into his personality, his mind and his emotions, not to entangle him in any criminal prosecution. The District Court expressed a proper concern that disclosures of criminal acts by the inmate might lead to new charges. The court suggested that in such a case the exclusion at any subsequent criminal trial of the inmate's admissions would suffice to protect his constitutional rights. I agree with the court's concern, but would go further. Not only should such disclosures be inadmissible in any criminal proceeding, but they ought not become the predicate for further investigation leading to a prosecution. I would insist that the prisoner is entitled to complete immunity in respect to matters he is compelled to disclose.

There is an additional complication where the prisoner has pending an appeal from his conviction. In no event should any information divulged or evidence developed from information divulged be admissible against the prisoner if a new trial is awarded.

These matters need not be further pursued since they are now before us.

right against self-incrimination cannot be rigidly applied in Patuxent proceeding. I rest, however, not on the asserted ground that the Act is "civil" but that, because of the unusual nature of the necessary inquiries, the legitimate objectives of the legislation would be frustrated were inmates permitted to refuse cooperation. Granting the inmate the right to silence would in many instances thwart the personal examinations and interviews considered indispensable in determining whether the prisoner is or is not a defective delinquent.[7]

II. THE RIGHT OF CONFRONTATION

The records compiled by the Patuxent staff, upon which they rest their conclusions, contain extensive reports from various sources as to the inmate's past criminal and antisocial behavior. These reports are admissible at the judicial hearing, though based on observations and conclusions of persons who do not testify in court. The introduction of this hearsay evidence in a criminal prosecution would unquestionably violate a defendant's right to confront and cross-examine witnesses against him as guaranteed by the Sixth Amendment.[8]

The hazard of hearsay reports is that they may become vehicles whereby false allegations enter the judicial proceedings—allegations which the prisoner may be hard pressed to refute. Although any witness subject to the jurisdiction of the court may be subpoenaed, the prisoner's

---

[7] Petitioners' reliance on the Supreme Court's decision in In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) is misplaced for at least two important reasons. The aim of the inquiry in the *Gault* hearings was not to ascertain the mental state of the juvenile, but whether he had committed the specific offense with which he stood charged. Here the inquiry is not intended primarily to prove past criminal conduct, but to assess the inmate's emotional and mental state. Moreover, in *Gault* the Court discounted the state's claim that the juvenile process "rehabilitated" its clients. By contrast, Patuxent, according to the District Court's finding, does engage in a bona fide treatment program.

[8] In Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) and Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965), the Supreme Court recognised this right of a defendant under the Sixth Amendment as fundamental and essential to a fair trial and therefore obligatory on the states under the Fourteenth Amendment.

counsel may often be unable to find and produce witnesses to contest reported incidents thus introduced at the judicial hearing.

Yet it must be recognized that a meaningful evaluation of the inmate's mental condition will often depend on an assessment of numerous incidents, some long in the past. If the jury is to be apprised of the considerations underlying the psychiatrists' conclusions without imposing a truly impossible burden on the state authorities, flexibility in departing from strict rules of evidence may be unavoidable. At issue is the subject's entire lifetime behavioral pattern, not whether a certain act was committed. In light of the special and unusual nature of the inquiry, hearsay evidence may be necessary for the staff to rely upon in forming its opinion; and if in the subsequent judicial review the jury is not to abdicate its obligation to make an independent judgment, it must, in its turn, have access to all of the information, including the hearsay evidence, underlying the expert opinion of the psychiatrists. Thus the experts are afforded the latitude essential to perform their function and the jury is not restricted in its purview of the case. Nevertheless, no evidence denying a prisoner the right of confrontation should be admitted unless indispensable to explain to the jury the foundations of the psychiatric opinions; admission of such evidence is hardly justified where the psychiatrists have relied primarily on personal interviews and available witnesses in forming their conclusions.

Of course, beyond the confrontation issue, due process commands that a reliable evidentiary foundation be laid in defective delinquency proceedings, as in any other proceeding, civil or criminal. Accordingly, any assessment of the sufficiency of the evidence to support a defective delinquency finding involves scrutiny of the character as well as the substance of the admitted evidence. If at the judicial hearing there appears serious doubt as to the reliability or trustworthiness of the reports of antisocial or criminal behavior, the trial judge should in the exercise of his discretion exclude the hearsay. Likewise, as to hearsay evidence which is admitted, the jury should be duly cautioned on the risks inherent in any hearsay testimony.

III. RIGHT TO COUNSEL

Although counsel is provided at the judicial hearing itself, he is presently entirely excluded from the interrogations and investigations conducted by the staff for the purpose of determining defective delinquency. One perceives a strong analogy, however, between the initial steps at Patuxent and the pretrial stages of criminal prosecutions in which the Supreme Court has insisted on the right to counsel: Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (police interrogations); United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (lineups); and Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970) (preliminary hearings before magistrates). Both the Patuxent prehearing stages and preliminary criminal phases are critical links in chains potentially leading to long confinement, and the same due process considerations dictate counsel's presence under both schemes. The assistance of counsel during the fact-gathering and adjudicating process at Patuxent might protect the inmate against misguided or erroneous conclusions by the staff[9] and could facilitate timely discovery of the nature of the state's case, making possible the preparation of a proper defense at the judicial hearing.

As discussed in the preceding section, the record compiled by the staff embodies an accumulation of information some of which may be of doubtful reliability. The inmate's background is by the staff's own admission one of the most important factors, if not the single most important factor,

---

[9] In Thornton v. Corcoran, 132 U.S.App.D.C. 232, 407 F.2d 695 (1969), the court discussed the implication of United States v. Wade, *supra*, in respect to counsel's participation in staff conferences at Saint Elizabeths Hospital where a recommendation is reached as to a defendant's competency and criminal responsibility. The court held that counsel should be included in the process, though the incomplete factual record in that case prevented the court from formulating precise rules. The court emphasized:

> [T]here can be little doubt that his staff conference at Saint Elizabeths will represent an important confrontation [of the defendant] with experts likely to testify for the Government. Moreover, just as the Supreme Court argued in *Wade* that a witness once having identified a suspect in a lineup is unlikely to retract the identification at trial, our experience suggests that the representatives of Saint Elizabeths rarely contradict in their testimony at trial an opinion they have voiced at the staff conference.

407 F.2d at 699.

in diagnosing the inmate. If the history is inaccurate, the medical evaluation is liable to be incorrect. There must be an early opportunity for counsel to question the contents of the inmate's dossier to avert the danger of a vital staff recommendation being founded on false data.

The majority makes this interesting suggestion:

> "* * * it might prove fruitful to permit the independent psychiatrist to participate in the proceedings at an earlier stage than is presently allowed; his participation in staff conferences may be beneficial to the staff and to the inmate he examines."

I agree, but do not see why a measure of participation by counsel should not be tolerated. As Judge Bell of this court has declared:

> "* * * there is no reason to assume that reputable counsel and psychiatrists could not cooperate in the administration of tests and the necessary factual investigations of the patient's background to verify or refute his own statements."

Timmons v. Peyton, 360 F.2d 327, 331 (4th Cir. 1966).

Indeed, there is reason to think that much of the present resistance of prisoners to submitting to the Patuxent interrogations arises from suspicion and misunderstanding on their part which a lawyer could in many cases dispel, thus facilitating the staff's work. Staffmen, at the beginning at least, are likely to be suspect simply because they are members of the institutional apparatus.

The retained or appointed counsel should consult with the prisoner as soon as practicable after his admission to the Institution. I would not insist that counsel be present during the individual psychiatric examinations, but counsel should be allowed access to the information concerning the prisoner's history as it is assembled. When the inmate is admitted into the final conference for questioning by the staff, counsel should be allowed to attend, to interrogate his client in order to clarify matters in dispute, and to make a statement on his client's behalf. Although the staff may of course consult with one another in private, a free and open discussion by counsel with the psychiatric staff as to the basis of their report should be encouraged. It

would enhance the fairness of the process and enable counsel to obtain a minimal familiarity with the complex psychiatric issues a defective delinquency determination is likely to involve. It is not my purpose to convert the staff conference into a full-fledged adversarial proceeding, but only to guard as far as possible against the informal fact-gathering's resulting in an inaccurate factual basis for the psychiatrists' conclusions.

There is no justification for the unlimited confidence accorded to the staff members and the apprehensions the majority expresses over the allowance of any role to lawyers. I rather think that the staff is inclined to overestimate the need and the usefulness of secrecy, and that if a more flexible policy were adopted it would be found not unworkable, but beneficial. It would help to clear away suspicion that fundamental fairness is being destroyed under a cloak of concealment.

The above suggestions with respect to the right of counsel are advanced tentatively. If adopted, they should be deemed, like other conclusions of mine and the majority's own holdings, subject to review and reconsideration from time to time as experience dictates.

IV. THE STANDARD OF PROOF

The Defective Delinquent Act does not itself specify the burden of proof that the state must sustain in order to commit an individual to Patuxent for an indefinite period. The Maryland courts have sanctioned the civil standard of "fair preponderance." *See* Purks v. State, 226 Md. 43, 171 A.2d 726 (1961).

The petitioners assert on the contrary that due process requires the state to prove "beyond a reasonable doubt" that the inmate is a defective delinquent. They rely on the recent Supreme Court case of In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), which invalidated a New York statutory provision allowing juvenile delinquency determinations to be made upon a preponderance of the evidence. The Court held that proof beyond a reasonable doubt is constitutionally required in adjudications of juvenile delinquency as in criminal trials. It expressly rejected the New York Court of Appeals' view that there was only

a "tenuous" difference between the reasonable doubt and the preponderance standards. The Supreme Court would not acquiesce in this minimization of the difference. Instead it stressed the danger that the lesser standard might be misinterpreted as calling on the trier of fact "merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted." 397 U.S. at 367, 90 S.Ct. at 1074. The reasonable doubt standard is indispensable in both criminal and juvenile proceedings, according to the Supreme Court, for "it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." 397 U.S. at 364, 90 S.Ct. at 1072.

The objections to the preponderance standard apply with equal force in defective delinquency hearings—indeed they are even more compelling in the latter class of cases, since indefinite incarceration is at stake. Due process commands that the jury must be satisfied beyond a reasonable doubt as to all objective facts in dispute, including the truth of any alleged incidents relied upon by the psychiatrists in reaching their recommendation.

It must be recognized, however, that as to the *ultimate* issue of the inmate's dangerousness, the beyond a reasonable doubt standard may in practical operation be too onerous. After all, the ultimate issue is not as in a criminal case whether an alleged act was committed or event occurred, but the much more subjective issue of the individual's mental and emotional character. Such a subjective judgment cannot ordinarily attain the same "state of certitude" demanded in criminal cases. A number of commentators have suggested that a standard lying between the civil and the criminal may suffice where a determination of "dangerousness" is at issue. Frequently advocated is a standard of "clear and convincing evidence." [10]

This measure of proof is not entirely lacking in judicial support. In Woodby v. Immigration and Naturalization Service, 385 U.S. 276, 87 S.Ct. 483, 17 L.Ed.2d 362 (1966),

---

[10] Note, Civil Commitment of the Mentally Ill: Theories and Procedures, 79 Harv.L.R. 1288, 1291 (1966); Comment, Due Process for All—Constitutional Standards for Involuntary Civil Commitment and Release, 34 U.Chi.L.R. 633, 654-59 (1967).

the Supreme Court was faced with a dilemma similar to the one we now confront. The issue was what standard of proof is required in deportation proceedings. The Court held that deportation could not be considered tantamount to a criminal conviction, and did not call for the same standard of proof. Yet, perceiving that deportation was a drastic deprivation, the Court held it impermissible for an individual to be "banished from this country upon no higher degree of proof than applies in a negligence case." 385 U.S. at 285, 87 S.Ct. at 487. The Court fashioned an intermediate standard of "clear, unequivocal, and convincing evidence." [11]

The Court's approach in *Woodby* seems to be suitable for defective delinquency hearings. We should not tolerate the lax standard presently employed in committing inmates to potentially lifetime incarceration at Patuxent. Due process, I would hold, requires that the state shall establish by at least "clear and convincing evidence" that the individual is a defective delinquent. As Justice Harlan commented in his concurrence in *Winship, supra,* "a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." 397 U.S. at 370, 90 S.Ct. at 1076. The standard of proof is more than an empty semantic exercise; it reflects the value society places on individual liberty. I cannot agree that the Constitution tolerates an indeterminate confinement at Patuxent on no higher level of proof than that applied in a civil proceeding for money damages.

V. CONCLUSION

In light of the views set forth in Parts III and IV, I would reverse the decision of the District Court and require the state to hold new defective delinquency hearings for the petitioners under a proper standard of proof. In any fact-finding and adjudicative process hereinafter conducted by

[11] The Court noted that standard was no stranger to the law, and has been traditionally imposed in civil cases involving allegations of civil fraud, adultery, illegitimacy of a child born in wedlock, lost wills, oral contracts to make bequests, and the like. 385 U.S. at 285 fn. 18, 87 S.Ct. 483. *See* 9 Wigmore, Evidence § 2498 (3d. 1940).

the Patuxent staff, counsel should be allowed to participate in the manner described in Part III.

As already indicated, I think that the courts should regard Patuxent with a benign eye and that for the present a degree of flexibility is appropriate in dealing with Patuxent issues. I venture now to add a word of admonition to the officials of the Institution. In formulating and executing institutional policies the administrators should defer to traditional standards of fair procedure prized, even though not specifically commanded, by the courts. The officials' aim should not be minimal compliance to escape judicial condemnation, but maximum compliance with the spirit and essence of the Bill of Rights protections. Present policies and practices should be thoroughly examined by them in light of these principles. Administered with this unstinting attitude, the Institution's still experimental program will the more likely progress smoothly and meet with general satisfaction.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE
FOURTH CIRCUIT

No. 13,421

ALBERT DELANOR MUREL, *Appellant,*

vs.

BALTIMORE CITY CRIMINAL COURT, and Director of Patuxent Institution, State of Maryland, *Appellees.*

Appeal from *the United States District Court for the District of* Maryland.

This cause *came on to be heard on the record from the United States District Court for the District of* Maryland, *and was argued by counsel.*

On consideration whereof, *It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby,* affirmed.

/s/ Samuel W. Phillips
Clerk

Filed, JAN 4, 1971, Samuel W. Phillips *Clerk*

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed, MAR 1, 1971, Samuel W. Phillips, *Clerk*

No. 13,415

CHARLES MASON TIPPETT, *Appellant*,

v.

STATE OF MARYLAND, and Director of Patuxent Institution, *Appellees*.

No. 13,421

ALBERT DELANOR MUREL, *Appellant*,

v.

BALTIMORE CITY CRIMINAL COURT, and Director of Patuxent Institution, State of Maryland, *Appellees*.

No. 13,426

ROBERT HAYES, JR., *Appellant*,

v.

HAROLD M. BOSLOW, M.D., Director, Patuxent Institution, *Appellee*.

No. 13,433

WILLIAM R. MONROE, *Appellant*,

v.

DIRECTOR OF THE PATUXENT INSTITUTION, and State of Maryland, *Appellees*.

No. 13,434

BRADLEY ARLINGTON AVEY, *Appellant*,

v.

STATE OF MARYLAND, Harold M. Boslow, as Director of Patuxent Institution, and Vernon L. Peppersack, as Commissioner, State Department of Corrections, *Appellees*.

No. 13,441

GEORGE L. CRESWELL, *Appellant*,

v.

DIRECTOR, PATUXENT INSTITUTION, *Appellee*.

APPEALS FROM THE UNITED STATES DISTRICT COUNT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.

Upon consideration of the appellants' petition for rehearing and suggestion for rehearing *en banc*, the panel having determined that the petition presents no questions warranting reconsideration, and no judge in regular active service having requested a poll of the Court,

IT IS ORDERED that the petition for rehearing *en banc*, be, and the same is hereby, denied.

For the Court:
/s/ Clement F. Haynesworth, Jr.
Chief Judge, Fourth Circuit

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13,415

CHARLES MASON TIPPETT, *Appellant*,

v.

STATE OF MARYLAND, and Director of Patuxent Institution, *Appellees*.

No. 13,421

ALBERT DELANOR MUREL, *Appellant*,

v.

BALTIMORE CITY CRIMINAL COURT, and Director of Patuxent Institution, State of Maryland, *Appellees*.

No. 13,426

ROBERT HAYES, JR., *Appellant*,

v.

HAROLD M. BOSLOW, M.D., Director, Patuxent Institution, *Appellee*.

No. 13,433

WILLIAM R. MONROE, *Appellant*,

v.

DIRECTOR OF THE PATUXENT Institution, and State of Maryland, *Appellees*.

No. 13,434

BRADLEY ARLINGTON AVEY, *Appellant*,

v.

STATE OF MARYLAND, Harold M. Boslow, as Director of Patuxent Institution, and Vernon L. Peppersack, as Commissioner, State Department of Corrections, *Appellees*.

No. 13,441

GEORGE L. CRESWELL, *Appellant*,

v.

DIRECTOR, PATUXENT INSTITUTION, *Appellee*.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.

Upon consideration of the appellants' petition to recall the mandate and their second petition for a rehearing with

a suggestion for rehearing en banc, the panel having determined that the petition presents no question warranting reconsideration, Judge Sobeloff in a separate statement explaining the reason for his conclusion, and no Judge in regular active service having requested a poll of the Court,

IT IS ORDERED that the petition to recall the mandate and for a rehearing by the panel or en banc be, and the same is hereby, denied.

For the Court:
/s/ Clement F. Haynesworth, Jr.
Chief Judge, Fourth Circuit

SOBELOFF, Senior Circuit Judge, concurring specially:

Joining in the denial of the petition for rehearing, I wish to add a word of explanation.

If I am correct in my interpretation, the petitioners assert that, despite the court's finding that Patuxent has adequate facilities, the petitioners or some of them are in fact not receiving treatment. In my separate opinion heretofore filed in this case I observed:

> Any future review must appraise not only the general treatment program, but whether the particular prisoner before the court is receiving the benefits of Patuxent's program. It does him no good if there is a program of treatment, but it has been arbitrarily withheld from him.

Such issues, however, cannot be adjudicated abstractly but only upon a fully developed record from which the court may ascertain what if any treatment is afforded the particular inmate; his condition and whether he is in fact treatable; and any other relevant information.

The present record is not sufficient for this purpose.

SUPREME COURT OF THE UNITED STATES

No. 70-5276, October Term, 194.

ALBERT DELANOR MUREL et al., *Petitioners*,

v.

BALTIMORE CITY CRIMINAL COURT et al.

On petition for writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

December 20, 1971

☆ U.S. Government Printing Office: 1972—456-451/473

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1971
No. 5276

Supreme Court, U.S.
FILED
FEB 4 1972
E. ROBERT SEAVER, CLERK

ALBERT DELANOR MUREL,

Petitioner,

vs.

BALTIMORE CITY CRIMINAL COURT and DIRECTOR OF PATUXENT INSTITUTION, STATE OF MARYLAND,

Respondent.

ROBERT HAYES, JR.,

Petitioner,

vs.

HAROLD M. BOSLOW, M.D., Director Patuxent Institution,

Respondent.

BRADLEY ARLINGTON AVEY,

Petitioner,

vs.

STATE OF MARYLAND, HAROLD M. BOSLOW as Director of Patuxent Institution, and VERNON L. PEPPERSACK as Commissioner, State Department of Corrections,

Respondent.

GEORGE L. CRESWELL,

Petitioner,

vs.

DIRECTOR, PATUXENT INSTITUTION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

BRIEF OF AMICUS CURIAE.

ALAN F. CHARLES,
LAURENS H. SILVER,
SHELLEY MERCER,
JOANNE B. STERN,
National Legal Program on Health Problems of the Poor,
UCLA School of Law,
Los Angeles, Calif. 90024,
Attorneys for Amicus Curiae National Legal Program on Health Problems of the Poor.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

	Page
Interest of Amicus Curiae	1
Summary of Argument	3
Argument	5
I.	
The Maryland Defective Delinquent Act Is Unconstitutional in That It Imposes Compulsory Confinement Without Affording the Persons Accused the Fundamental Protections Required by Due Process	5
A. The Fact-Finding Procedure	5
B. The Sanction	7
C. The Due Process Requirements	8
1. The Right to Notice and a Hearing	10
2. Conviction by Proof Beyond a Reasonable Doubt	14
3. The Right to the Effective Assistance of Counsel	15
4. The Right of Confrontation and Cross-Examination	19
5. The Privilege Against Self-Incrimination	21
II.	
The Maryland Defective Delinquent Act Is Unconstitutional on Its Face and as Applied in That It Provides for Civil Incarceration Without Treatment	24
A. The Act Permits Persons Subject to "Intellectual Deficiency or Emotional Unbalance" to Be Indefinitely Confined Even if Treatment Is Unavailable	24

Page

B. Persons Civilly Committed for Treatment Purposes Have a Constitutional Right to Treatment 26

C. Indefinite Commitment to Patuxent Institution Without Treatment Is Punishment for Mere Status in Violation of the Prohibition Against Cruel and Unusual Punishment 27

D. Indeterminate Commitment to Patuxent Institution Without Treatment Is Preventive Detention Depriving the Prisoner of His Liberty Without Due Process and in Violation of the Equal Protection Clause.. 29

1. The Act Imposes a Criminal Penalty on the Basis of a Proceeding Which Fails to Afford the Fundamentals of Due Process 31

2. The Act Replaces the Presumption of Innocence With the Presumption That Given the Opportunity, the Subject Confined Would Commit Crimes 32

3. The Act Denies Due Process and Equal Protection in That It Constitutes Punishment in the Absence of Specific Misconduct and Without an Ascertainable Standard of Guilt.. 33

Conclusion 37

EXHIBIT A. Los Angeles Times Tues., Nov. 16, 1971—Part I. Parole Plan to Reduce Prison Violence Voted 1

TABLE OF AUTHORITIES CITED

Cases	Page
Blocker v. U.S., 288 F.2d 853 (D.C. Cir. 1961)	36
Buck v. Bell, 274 U.S. 200 (1927)	27
Davis v. U.S., 345 F.2d 441 (D.C. Cir. 1965), cert. denied, 385 U.S. 868 (1966)	33
Director of Patuxent Institution v. Daniels, 243 Md. 16, 221 A.2d 397 (1966)	5
Escobedo v. Illinois, 378 U.S. 478 (1964)	17
Gault, In re, 387 U.S. 1 (1967)	8, 9, 11, 14, 16, 20, 22
Gerchman v. Maroney, 355 F. 2d 302	9
Goldberg v. Kelly, 397 U.S. 254 (1970)	11, 12
Griggs v. Duke Power Company, 401 U.S. 424 (1971)	29
Grosso v. U.S., 390 U.S. 62 (1968)	23
Haynes v. U.S., 390 U.S. 85 (1968)	23
Hirabayashi v. U.S., 320 U.S. 81 (1942)	30
Jacobson v. Massachusetts, 197 U.S. 11 (1905)	27
Kennedy v. Mendoza-Martinez, 372 U.S. 168	9
Korematsu v. U.S., 323 U.S. 214 (1944)	30
Lanzetta v. New Jersey, 306 U.S. 451 (1939)	37
Leary v. U.S., 395 U.S. 6 (1969)	23
Marchetti v. U.S., 390 U.S. 39 (1968)	23
Miranda v. Arizona, 384 U.S. 436 (1966)	21, 22, 23
Oliver, In re, 333 U.S. 257 (1940)	13
Olmstead v. United States, 277 U.S. 438 (1928)	31
Pointer v. Texas, 380 U.S. 400 (1965)	19
Robinson v. California, 370 U.S. 660 (1962)	27, 28
Simon v. Craft, 182 U.S. 427 (1901)	10

Page

Specht v. Patterson, 386 U.S. 605 (1967) 8, 15, 19, 21, 33

Spevack v. Klein, 385 U.S. 511 (1967) 23

Stack v. Boyle, 342 U.S. 1 (1951) 32

State v. Bell, 188 Atl. 737 38

Timmons v. Peyton, 360 F.2d 327 (4th Cir. 1966) 17, 18

Tippett v. State of Maryland, 436 F.2d 1153 22

United States v. Brown, 381 U.S. 437 9

United States v. L. Cohen Grocery Co., 255 U.S. 81 (1920) 34, 37

U.S. v. Covington, 395 U.S. 57 (1969) 23

United States v. Wade, 388 U.S. 218 (1967) 16, 18

Williams v. Illinois, 399 U.S. 235 (1970) 28, 33

Williamson v. U.S., 184 F.2d 280 (2d Cir. 1950) .. 32

Winship, In re, 397 U.S. 358 (1970) 14, 15

Wyatt v. Stickney, 325 F.Supp. 781 (M.D. Ala. 1971) 26

Statutes

Defective Delinquent Act, Sec. 1 31

Maryland Annotated Code, Art. 31B, Sec. 5 ..... 5, 7, 24

Maryland Annotated Code, Art. 31B, Sec. 6 ..... 5, 6

Maryland Annotated Code, Art. 31B, Sec. 7 6

Maryland Annotated Code, Art. 31B, Sec. 8 7

Maryland Annotated Code, Art. 31B, Sec. 9(b) 7

Maryland Annotated Code, Art. 31B, Sec. 13(b) .. 7

United States Constitution, Fifth Amendment 21, 22, 23

Page

United States Constitution, Sixth Amendment 17, 19, 20

United States Constitution, Eighth Amendment .. 28, 32

Textbooks

Carroll, L., Through the Looking Glass (Harper & Bros. ed. 1902), p. 88 ..... 29, 30

Dershowitz, Alan, "Psychiatry in the Legal Process: A Knife That Cuts Both Ways," Trial, Feb./March 1968, p. 29 30

Dershowitz, Alan, "Psychiatry in the Legal Process: A Knife That Cuts Both Ways, Feb./March 1968 Trial, pp. 29, 30, 31 ..... 36, 37

Mercer, Dr. Jane, "Socio-Cultural Factors in Labelling Mental Retardates," 48 Peabody Journal of Educ. (April 1971), p. 188 29

Subcommittee on Mental Health Services, California Legislature, Assembly Committee on Ways and Means, pp. 33-38 29

Tribe, Laurence H., "An Ounce of Detention: Preventive Justice in the World of John Mitchell," 56 Virginia Law Review (1970), pp. 371, 393 35

IN THE

Supreme Court of the United States

October Term, 1971
No. 5276

ALBERT DELANOR MUREL,
Petitioner,

vs.

BALTIMORE CITY CRIMINAL COURT and DIRECTOR OF PATUXENT INSTITUTION, STATE OF MARYLAND,
Respondent.

ROBERT HAYES, JR.,
Petitioner,

vs.

HAROLD M. BOSLOW, M.D., Director Patuxent Institution,
Respondent.

BRADLEY ARLINGTON AVEY,
Petitioner,

vs.

STATE OF MARYLAND, HAROLD M. BOSLOW as Director of Patuxent Institution, and VERNON L. PEPPERSACK as Commissioner, State Department of Corrections,
Respondent.

GEORGE L. CRESWELL,
Petitioner,

vs.

DIRECTOR, PATUXENT INSTITUTION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

BRIEF OF AMICUS CURIAE.

Interest of the Amicus Curiae.

The National Legal Program on Health Problems of the Poor is a law reform center funded by the U.S. Office of Economic Opportunity to provide support for

OEO Legal Services programs across the country in cases involving health problems of the poor, and to provide, through education, research and legal representation, assistance in the preparation of important litigation in health law. The Program is based at the U.C.L.A. School of Law and has available to it a full staff, including attorneys and health professionls, and the resources of the University in support of its work.

The Program has done extensive work to improve delivery of mental health services and to protect the civil rights of individuals involved in the mental health system. The Program has been particularly concerned that voluntary mental health services be widely available and that involuntary mental health services actually fulfil treatment purposes. Attorneys from the Program have been active in mental health services planning, drafting legislation, and lawsuits to ensure, among other things, access to voluntary services, informed consent prior to experimentation, and involuntary patients' right to treatment.

The case under review presents a number of constitutional questions which affect the delivery of mental health services. Of particular interest to the Program are those issues which concern the due process rights of individuals compelled to submit to psychiatric treatment and the right of those persons to individualized treatment. The *amicae* have limited this brief to argument on those issues. To avoid unnecessary repetition the brief omits the history of the case in the courts below, jurisdictional statement and statement of facts.

Summary of Argument.

The Maryland Defective Delinquent Act provides that emotionally unbalanced or intellectually deficient persons, who have been convicted of a crime, may be civilly committed until the time when their release will not jeopardize the safety of society. Proceedings to determine whether a person is a defective delinquent consist of the intial referral by the trial court, the examination and report by the psychiatric professionals, and the hearing. These proceedings are guided by rules of civil procedure.

In examining similar statutes, this Court has looked to two principle factors to determine whether or not due process requires the full range of protections available in criminal prosecutions: 1) whether the statute requires a new finding of fact, and 2) whether the sanction imposed is punitive. Confinement, particularly indeterminate confinement, has been held to be punitive whether its purpose is preventive, rehabilitative or retributive.

Defective delinquency requires at least two new findings of fact: dangerousness to society and emotional unbalance or intellectual deficiency. The sanction is confinement possibly for life. Due process requires that the subject be afforded all the protections of a criminal prosecution.

The Defective Delinquent Act clearly provides a mechanism for civil incarceration regardless of whether the subject is treatable or in fact receiving adequate

treatment. It is essentially a preventive detention statute, that is, a statute to prevent future anti-social acts by confining persons adjudged to have a propensity for crime.

As a result of its application and the unavailability of treatment, persons may be forced to serve a sentence in excess of the statutory maximum for their original crime. Such discriminatory use of indeterminate sentences based on criteria such as I.Q. tests denies the subject equal protection.

Preventive detention based on minimal procedural protections replaces the traditional presumption of innocence with a presumption of guilt given the opportunity and makes preparation of a defense nearly impossible. A person accused under the Act may be punished indefinitely in the absence of specific misconduct, in fact, for acts which he has yet to commit. Such a procedure clearly deprives the accused of due process and equal protection.

ARGUMENT.

I.

THE MARYLAND DEFECTIVE DELINQUENT ACT IS UNCONSTITUTIONAL IN THAT IT IMPOSES COMPULSORY CONFINEMENT WITHOUT AFFORDING THE PERSONS ACCUSED THE FUNDAMENTAL PROTECTIONS REQUIRED BY DUE PROCESS.

The Maryland Defective Delinquent Act provides for detention for an indeterminate period for persons found to be defective delinquents. Treatment must be afforded only "when appropriate." Confinement is terminated only when it is "reasonably safe for society to terminate the confinement and treatment."

A. The Fact-Finding Procedure.

The procedure for determining defective delinquent status is outlined in the statute and the case of *Director of Patuxent Institution v. Daniels*, 243 Md. 16, 221 A.2d 397 (1966).[1] In brief, this procedure consists of three

---

[1]As defined by the statute a defective delinquent is any individual who has been convicted of one or more of certain categories of criminal offenses and who . . ., "by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment."—Annotated Code of Maryland, Article 31B, §5.

The prior offenses must have been:

(1) A felony; (2) a misdemeanor punishable by imprisonment in the penitentiary; (3) a crime of violence; (4) a sex crime involving: (A) Physical force or violence, (B) disparity of age between an adult and a minor, or (C) a sexual act of an uncontrolled and/or repetitive nature; (5) two or more convictions for any offenses or crimes punishable by imprisonment, in a criminal court of this State. Annotated Code of Maryland, Article 31B, §6.

steps: 1) referral for examination, 2) the examination itself, and 3) the hearing.

The referral step provides virtually no protections for the subject. The trial court in which a person was convicted may refer him for examination on the request of the prosecutor or on its own initiative. The subject receives no notice that such a request for indeterminate commitment as a defective delinquent has been made, but merely receives a copy of the order for examination after the judge has made his decision. No counsel or hearing is provided at this stage of the proceedings. Pursuant to the order for examination, the person is immediately transferred to Patuxent Institution, Annotated Code of Maryland, Art. 31B, §6.

The examination step takes place at Patuxent Institution. At least three professionals (one psychiatrist, one physician, and one psychologist) examine the subject and compile all "pertinent information," including information about the crime for which he was convicted, other anti-social or criminal acts committed during the life of the individual, sentencing and probation reports, and "reports as to his social, physical, mental, and psychiatric condition and history." The group of professionals then determine, by majority vote if necessary, whether in their opinion the subject is a defective delinquent. The professionals submit their findings in a written report to the court. Art. 31B, §7. At this stage in the proceedings, the subject is not represented by counsel and has no representative present at the decision-making conference. Further he is not allowed to assert his privilege against self-incrimination without subjecting himself to punishment, for individuals who do not cooperate with the interviewers may be held

indefinitely at Patuxent without any judicial hearing. (App. 217, App. 68-70, 217, 281-82, 311.)

The hearing step of the procedure follows if the professionals have reported that the subject is in their opinion a defective delinquent. Prior to the hearing the subject is summoned to the court, advised of the report and pendency of the defective delinquency proceedings and advised of his right to counsel. Counsel is appointed by the court at this stage. Counsel for the subject has access to the reports compiled by the professionals at Patuxent Institution.

At the hearing itself, the issue is simply whether or not the subject is a defective delinquent. Annotated Code of Maryland, Art. 31B, §8. The subject has a right to a jury trial. However the state need only prove defective delinquency by a preponderance of the evidence and with concurrence of only three-quarters of the jury. The State can use hearsay evidence to present its *prima facie* case. The subject must subpoena witnesses whom he wishes to confront.

B. The Sanction.

If the court or jury finds that the subject is a defective delinquent, the court shall "order him to be committed or returned to the institution for confinement as a defective delinquent, for an indeterminate period without either maximum or minimum limits." The original sentence is suspended, Art. 31B, §9(b). The defective delinquent must then remain at Patuxent Institution until the Institutional Board of Review, which must review each delinquent's status annually (Art. 31B, §13(b)), determines that it is "reasonably safe for society to terminate the confinement and treatment," Art. 31 B, §5.

C. The Due Process Requirements.

The procedure outlined in the Defective Delinquent Act is labelled "civil". The sanction however is a criminal penalty: incarceration possibly for life. Treatment pursuant to the law is to be afforded only "when appropriate". As will be shown *infra*, the statute is a preventive detention mechanism which affords indefinite periods of commitment for persons deemed dangerous who have committed at least one anti-social act. The severity of this sanction renders the procedural protections afforded the subject inadequate despite the fact that the confinement is labeled civil and imposed for the purposes of treatment and prevention of dangerous behavior.

Since the cases of *In re Gault*, 387 U.S. 1 (1967), and *Specht v. Patterson*, 386 U.S. 605 (1967), courts have given precedence to the fact of involuntary incarceration rather than the promises and speculation about therapeutic and rehabilitative effect in determining to what extent procedural due process is applicable to fact-finding proceedings labeled "civil". In *Gault* and *Specht* this Court held that confinement must be viewed as confinement despite society's use of more palatable labels. In *Gault* this Court looked to the fact that, despite the benevolent purposes for civil rather than criminal commitment of juveniles, "[t]he boy is committed to an institution where he may be restrained of liberty for years." 387 U.S. 1, 27. The Constitution requires that such a deprivation of liberty can only be imposed after "the procedural regularity and the exercise of care implied in the phrase 'due process'." 387 U.S. 1, 27-8.

In *Specht v. Patterson*, in reviewing a sex offender statute, this Court also looked to the nature of the sanc-

tion rather than the superficial nature of the proceeding to determine due process requirements. Referring to *United States v. Brown,* 381 U.S. 437, 458, this Court noted that:

> [t]he punishment under the second Act [indeterminate confinement] is criminal punishment even though it is designed not so much for retribution as it is to keep individuals from inflicting future harm.

The fact that the subject in *Specht* had previously been convicted of a crime in no way reduced his right to due process since prosecution under the Sex Offenders Statute required a "new finding of fact . . . that was not an ingredient for the offense charged." 386 U.S. 605, 608. Approving the Third Circuit case of *Gerchman v. Maroney,* 355 F. 2d 302, 312, which involved a similar statute, this Court held that due process required a judicial hearing for the new finding of fact with the "full panoply of the relevant protections which due process guarantees in state criminal proceedings." 386 U.S. 605, 609.

In the case presently before this Court, the lower courts erred in focusing their analysis on the "criminal" or "civil" label of the statute. They applied the letter but not the spirit of *Kennedy v. Mendoza-Martinez,* 372 U.S. 168, by applying a restrictive definition of punishment. They ignored this Court's concern for reality rather than appearances in *Gault* and the definition of punishment applied in *United States v. Brown:*

> Punishment serves several purposes; retributive, rehabilitative deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment. 381 U.S. 437, 458.

The sanction required in the Maryland Defective Delinquent Act, indeterminate confinement of individuals who are emotionally unbalanced or intellectually deficient for the safety of society, is criminal punishment. That treatment may be incidentally afforded, if it is deemed to be "appropriate," does not change the nature of the commitment. Commitment under the Act requires the full due process protections afforded those accused in criminal prosecutions including: 1) the right to notice and a hearing, 2) conviction by proof beyond a reasonable doubt, 3) the right to the effective assistance of counsel, 4) the right of confrontation and cross-examination, and 5) the privilege against self-incrimination.

1. The Right to Notice and a Hearing.

The Maryland statute does not require that any notice of impending transfer be given to the inmate, nor that any kind of hearing be held on the issue. The individual accused of being a defective delinquent is summarily transferred to Patuxent Institution and is ordered to undergo the examinations and tests provided for therein. There is no requirement that the individual be apprised of the new proceeding nor the reasons for the examinations. He is given no opportunity to be heard on the matter and he has no right to challenge the initial order of commitment.

This procedure clearly violates the basic constitutional standards for adequate notice and the right to a fair hearing. In *Simon v. Craft,* 182 U.S. 427 (1901), the Court acknowledged that the due process requirement of full notice and an opportunity to be heard were applicable in mental commitment proceedings as well as criminal prosecutions. In order to comply with

these standards, notice of the charge must be given sufficiently in advance of the scheduled proceedings so that there is a reasonable opportunity to prepare, and it must set forth the alleged misconduct with some particularity. This Court held in *In re Gault*, 387 U.S. 1 (1967), that the hearing itself must give the individual the opportunity to be heard at a meaningful time and in a meaningful manner so that an initial determination as to the validity of the charges or order can be made. See also *Goldberg v. Kelly*, 397 U.S. 254 (1970).

The statute in question here provides that certain inmates can be transferred to Patuxent Institution for the purpose of examination without giving them any notice or the right to a hearing on the matter. The omission of these rights cannot be justified by claiming that since the individual has already been convicted and is subject to incarceration, he is not being deprived of any further rights by temporarily transferring him to a mental institution. The fact is that transfer and initial commitment of the inmate to Patuxent Institution is the first and most significant step in a long process which may well lead to indefinite or even permanent confinement. As such, it should be subject to basic due process requirements including the right to timely and adequate notice, and the right to a hearing wherein the validity of the order can be challenged.

Moreover, in *Goldberg v. Kelly, supra*, the court has indicated that the extent to which procedural due process must be afforded in a given situation is influenced by the extent to which an individual may be condemned to suffer grievous loss, and depends upon whether the individual's interest in avoiding that loss outweighs the government's interest in summary adjudication. In that case, the suspension of welfare benefits

was considered to be a sufficiently significant loss so as to require a hearing "at a meaningful time and in a meaningful manner" despite the state's interest in conserving fiscal and administrative resources.

In the case of commitment proceedings, the possible harm, stigma and deprivation of liberty an individual may suffer are far greater than that which may be suffered by the welfare recipient. Although an initial order of commitment does not necessarily mean that an individual will be classified as a defective delinquent, there is a strong possibility that this result will occur. Moreover, the intial transfer and examination procedures often lead in themselves to considerable additional loss of liberty, as, for example, when the inmate refuses to testify or cooperate with authorities. Before having to submit to such an order, the inmate should at least have the minimal due process protection afforded in *Goldberg, i.e.,* the right to timely and adequate notice and the right to a hearing wherein the factual premises on which the order is based can be challenged, and an initial determination of its validity can be made.

As the Act is written and applied, however, notice of the proceeding, nor right to a hearing is given to the inmate until after an affirmative decision is made by Patuxent officials on the issue of his "delinquency." By that time, the inmate has been confined to the mental institution for an average of nine months to a year without having had the opportunity to be heard or to question the original commitment order. (E. 669.)[2]

[2]References preceded by "App." refer to the Joint Appendix of the proceedings in the United States District Court below. References preceded by "E." refer to the Joint Record Extract used by the Court of Appeals of Maryland in the Daniels-Avey appeal. 243 Md. 16, 221 A.2d 397 (1966).

Moreover, he has had to undergo extensive interviews, tests, and examinations, which form the basis of the Institution's recommendation without ever having been notified of the charges against him or the nature and purpose of the proceeding. It is difficult to contend that the notice finally given to a prisoner after a year of confinement (and investigation) is timely and adequate, or that a hearing which takes place only after an official determination of the ultimate issue in the case is meaningful or fair. As Justice Frankfurter said *In re Oliver*, 333 U.S. 257 (1940):

> It would not be fair if in the court in which the accused can contest for the first time the validity of the charge against him, he comes handicapped with a finding against him which he did not have an adequate opportunity of resisting. At 284-85.

Clearly, then, the Act violates due process in that there are no provisions for notice and a hearing during the initial stages of the proceeding when the assertion of such rights would prove most valuable. The accused inmate has neither the right to be notified of the charges nor the right to be heard on those charges until a determination on the ultimate issue of defective delinquency has been rendered by the Patuxent Institution staff. In view of the critical nature of this official determination and the protracted length of time an inmate must stay at Patuxent Institution before the rendering of such judgment, the protections as afforded by the ultimate recognition of these rights at a later point are not sufficient to satisfy basic constitutional standards.

2. Conviction by Proof Beyond a Reasonable Doubt.

Under the Defective Delinquency Act, an affirmative adjudication of defective delinquency need not be beyond a reasonable doubt; rather the statute as applied requires that such a determination need be only by a "preponderance of the evidence." Such a standard is clearly inappropriate in the context of these proceedings and it has recently been declared unconstitutional in an analogous civil proceeding which was penal in nature. *In re Winship,* 397 U.S. 358 (1970).

As it is virtually impossible to distinguish this case from *Winship,* the rationale of that opinion is equally applicable in proceedings to determine defective delinquency. In *Winship,* this Court held that the constitutional safeguard of proof beyond a reasonable doubt is as much required during the ajudicatory stage of a delinquency proceeding as are those other constitutional safeguards required in *Gault.* In requiring the same standard applied in criminal trials, the court emphasized that regardless of the label applied to the proceeding, the critical determination was whether the sanctions imposed were punitive in nature and whether the loss of liberty involved was equivalent to that which results from the finding of guilt in a criminal trial.

In the present case, as in *Winship,* the accused has at stake an "interest of immense importance both because of the possibility he may lose his liberty . . . and because . . . he would be stigmatized by the conviction." 397 U.S. at 363. The penalty for being convicted under this Act may be far greater than that for which the inmate was originally convicted. The individual who is committed is incarcerated in a prison-like

setting for an indefinite period of time, perhaps for life. Moreover, in addition to his criminal conviction, he is further stigmatized by the label of defective delinquent, and all that it implies.

It is thus apparent that these defective delinquency proceedings have all the incidents of a criminal prosecution, and are penal in nature. The accused inmate should be entitled to the "full panoply of relevant protections which due process requires in criminal proceedings." *Specht v. Patterson,* 386 U.S. 605, 609 (1967). One of the mot important of these protections is the requirement of proof beyond a reasonable doubt. The court in *Winship* explicitly rejected the notion that there is "only a tenuous difference between the reasonable doubt and the preponderance standard." 397 U.S. at 367. Whenever an individual is subjected to such a harsh penalty as indeterminate confinement, he must be proved guilty beyond a reasonable doubt. The trier of facts cannot convict unless it reaches a "subjective state of certitude" about all the facts in issue.

Since the decision and rationale of the *Winship* case are clearly applicable here, the Maryland Act does not meet constitutional standards, and the inmates convicted under it have been denied an essential due process right.

3. The Right to the Effective Assistance of Counsel.

The inmate who is transferred to Patuxent Institution has no right to counsel until after an affirmative unilateral determination of delinquency is made by the staff. Generally, this does not occur until after the inmate has been at Patuxent Institution for several months. For inmates who refuse to cooperate, the right to counsel may never arise. (App. 68-70, 281-82, 311.)

During this time, the inmate is subjected to various interviews, tests and examinations and all the information upon which the staff bases its decision is gathered. By the time the inmate is finally given the right to counsel, that right has become almost meaningless. The trial itself is reduced to a mere formality since an affirmative decision by the staff almost always means commitment for the inmate.

In *United States v. Wade,* 388 U.S. 218 (1967), the Court asserted that the "plain wording of [the Sixth Amendment] encompasses counsel's assistance whenever necessary to assure a meaningful defense." *Id.* at 225. The accused must be allowed to have the guiding hand of counsel at every step in the proceedings against him. The Court stated in *Wade:*

> The accused is guaranteed that he need not stand alone against the state at any stage of the proceedings, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial. The principle of *Powell v. Alabama* and succeeding cases require that we scrutinize any pretrial confrontation of the accused to determine whether presence of counsel is necessary to preserve defendant's basic right to a fair trial, as affected by his right meaningfully to cross-examine witnesses against him and to have effective assistance of counsel at trial itself. *Id.* at 226-27.

The fact that these proceedings are labeled civil does not mean that a lesser standard should apply since the accused faces "the awesome prospect of incarceration" for life. A "meaningful defense" is therefore essential for the protection of his rights, *In re Gault.* In

view of the fact that the decision on the ultimate issue in the case has already been made by the time counsel is appointed, the ability of counsel to prepare and offer a meaningful defense is severely limited. The Court stated in *Escobedo v. Illinois,* 378 U.S. 478, 487 (1964):

> . . . the right to use counsel at the formal trial would be a very hollow thing if, for all practical purposes, the conviction is already assured by pretrial examination.

In the present case, the denial of the inmate's right to counsel at critical pretrial proceedings which actually determine his fate makes the trial itself a "hollow thing" and clearly violates his Sixth Amendment rights.

The right to counsel must arise as soon as the initial decision to transfer the inmate to Patuxent Institution is made. It is at this point that the validity of the order should be initially screened, since the transfer sets in motion a process which imposes severe limits on the individual's liberty. The inmate who is transferred must undergo a series of interviews, tests, and examinations at which information harmful to his interests is likely to be elicited. He is not apprised of the purpose of the proceedings, and he is not permitted to exercise any of his constitutional rights. In an atmosphere of such compulsion, where lack of co-operation is often regarded as evidence of delinquency, an inmate should be permitted to have the advice and assistance of legal counsel so that his basic constitutional rights may be protected.

Moreover, the right to counsel guarantee must also apply to critical pretrial staff conferences and all interviews which the inmate must attend. In *Timmons v.*

Peyton, 360 F.2d 327, 330 (4th Cir. 1966) the Court of Appeals has stated that

> . . . the preparation of the defense may not without violation of due process be postponed indefinitely until the state has completed its case.

Rather, the preparation of the defense must proceed concurrently with the state's. In the proceedings in question, however, there is no opportunity for counsel to prepare any defense until after the state has completed its case. By that time, the right to a defense is virtually meaningless. Not only has a determination of the inmate's defective delinquency already been made, but it has been made in a way that the defense will never adequately be able to discover. There is no effective way for defense's counsel to ascertain what actually went on at the staff conferences and psychiatric interviews. He can never really know, for example, whether the inmate's basic rights were violated, whether the determination of his delinquency rested on firm grounds or whether it resulted from the inmate's lack of co-operation.

In *Wade,* this Court held that every pretrial confrontation must be analyzed to determine whether "substantial potential prejudice" inheres in a particular confrontation, and whether an attorney can help avoid that prejudice. If the answer is affirmative, defense counsel must be presented to protect a suspect's constitutional rights. This standard would clearly be applicable to staff conferences which require the inmate's presence since they represent an important confrontation with experts likely to testify for the government. Just as the Court in *Wade* contended that a witness, having initially identified a suspect in a line-up, is un-

likely to retract that identification at trial, representatives of Patuxent Institution rarely (if ever) contradict in their testimony at trial an opinion they have voiced at a staff conference. Therefore, the presence of defense counsel at staff conferences and interviews is absolutely essential in order to protect the inmate's Sixth Amendment rights.

4. The Right of Confrontation and Cross-Examination.

During the trial itself, the accused has no real opportunity to confront or cross-examine the witnesses against him. The state's case is generally presented by a sole witness who reads a written report prepared by the staff, containing the work and conclusions of other staff members as well as information from sources outside the Institution. This witness, who is usually the Director of the Institution, has in most cases no personal familiarity with the accused's case. Not only are the reports considered admissible hearsay, but they are alone sufficient to support a finding of guilt. As "experts'" opinions, they are accorded heavy weight and it is virtually impossible for the inmate to overcome their effect.

In *Pointer v. Texas,* 380 U.S. 400, 404 (1965) the court explicitly stated that "the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him.". Moreover, in *Specht v. Patterson* the court ruled that the right of confrontation and cross-examination also applies in mental commitment proceedings, and that a psychiatric report, standing alone, is not sufficient to establish a constitutional basis for commitment. Clearly, then, the hearsay report of the Patuxent Institution staff does not meet the constitutional requirement, and

the state should have to produce the witnesses themselves before an adjudication of guilt can be made.

Under Maryland law, the accused has a right, through discovery procedures, to summon any of the persons whose names appear on the reports which are received in evidence. However, this procedural right falls far short of the right of cross-examination and confrontation which is required by The Sixth Amendment. In the first place, many of the people who mentioned in the reports may not be subject to a compulsory subpoena under the Maryland Rules in civil cases. In addition, most of the information in the report is itself based on hearsay so that producing the witness will be of little aid to the accused.

Moreover, it is constitutionally impermissible for the state to shift to the defendant the burden of finding and producing witnesses who are competent and who can testify to facts that the state must prove. The responsibility to do so must be on the state since it is the state that must prove guilt by a preponderance of the evidence. In *Gault*, the Court ruled that both "confrontation and sworn testimony by witnesses available for cross-examination [are] essential for a finding of 'delinquency'" in juvenile commitment proceedings. Since hearsay alone could not support a finding of guilt, it was clearly up to the state to produce the witnesses in court and give the defendant an opportunity to confront and cross-examine them.

Under the Maryland Act, an individual can be adjudged a defective delinquent on grounds which are

both vague and nebulous. (See, *infra*). It is impossible for a jury to make an independent, responsible decision on this issue when the only evidence received is a written report presented by the Director of the Institution. Moreover, if this is the only evidence presented, it is virtually impossible for the jury not to find defective delinquency on the basis of "a preponderance of evidence". If an inmate's right to a trial by jury is to have any meaning at all, the state must at least produce the "experts" who made the determination of delinquency, and the defense must have an opportunity to confront and cross-examine them at the trial itself. It is clear under *Specht* that a verdict based on hearsay alone does not meet constitutional standards.

5. The Privilege Against Self-Incrimination.

The Maryland Act, as it has been applied, clearly violates the inmate's right against self-incrimination. The inmates who are initially committed under the Act must spend an average of six months to a year at Patuxent Institution before a determination of their "delinquency" is made. During this time, they are compelled to submit to a variety of examinations and interviews. If they refuse to cooperate with the psychiatrists and other staff members, they are kept at the institution indefinitely. Thus, they are punished for exercising their Fifth Amendment right to remain silent.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court, in outlining the purpose and scope of the Fifth Amendment right, declared that the privilege "is avail-

able outside of criminal court proceedings" and it "serves to protect persons in all settings in which freedom of action is curtailed in any significant way from being compelled to incriminate themselves." Moreover, in *Gault, supra* at 49, this Court held the privilege applicable in juvenile proceedings and stated that "the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." Clearly then, under the Maryland Defective Delinquent Act, the constitution affords an inmate the right not to incriminate himself.

In the present case, inmates at Patuxent Institution must undergo intensive interviews in which they are asked to provide statements about anti-social conduct which may incriminate them and subject them to future prosecution. Until they agree to submit to such examinations and interviews, they may be confined to the institution indefinitely. Thus the exercise of the right against self-incrimination is punishable by indefinite detention at Patuxent Institution; yet if the inmate cooperates with the interviewing psychiatrists and makes statements about other anti-social acts he committed, such information could be used against him at a subsequent criminal proceeding. No immunity from prosecution is conferred by the statute on the inmate for statements made to the interviewing psychiatrists. (See Judge Sobeloff's separate opinion in *Tippett v. State of Maryland*, 436 F.2d 1153 at 1161).

This kind of punishment for the exercise of Fifth Amendment rights is clearly unconstitutional. In *Miranda*, the Court emphasized that the privilege to remain silent cannot be denied an individual, and that

the exercise of his Fifth Amendment rights must be "fully honored". As it stated therein, "If the individual desires to exercise his privilege, he has the right to do so. This is not for the authorities to decide. *Id.* at 480. Similarly, then, it is not for "the authorities" to decide to punish an individual who refuses to testify.

Moreover, the imposition of a civil penalty asserting the privilege against self-incrimination was specifically prohibited by this Court in *Spevack v. Klein*, 385 U.S. 511 (1967). Thus, Justice Douglas, in speaking for a plurality of the Court, said

> ". . . the concept of 'penalty' is not restricted to fine or imprisonment. It means . . . the imposition of any sanction which makes the assertion of the privilege (against self-incrimination) 'costly' ". *Id.* at 515.

In the instant case, the penalty of silence is an indefinite "holding" at Patuxent Institution;[3] on the other hand, the penalty for cooperation with the authorities at Patuxent Institution is possible prosecution. Inmates should not be confronted with the cruel dilemma of having to waive the privilege against self-incrimination in order to prevent indefinite commitment. The value of the privilege hangs upon a slender reed indeed if it must be asserted at such a price. Few will claim it under these circumstances. This is exactly the price which *Miranda* and *Spevack* constitutionally prohibit being extracted.

---

[3]In recent cases, the Court has struck down statutes which provided for criminal penalties for the exercise of one's rights against self-incrimination. *Haynes v. U.S.*, 390 U.S. 85 (1968); *Leary v. U.S.*, 395 U.S. 6 (1969); *U.S. v. Covington*, 395 U.S. 57 (1969); *Marchetti v. U.S.*, 390 U.S. 39 (1968); *Grosso v. U.S.*, 390 U.S. 62 (1968).

II.

THE MARYLAND DEFECTIVE DELINQUENT ACT IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THAT IT PROVIDES FOR CIVIL INCARCERATION WITHOUT TREATMENT.

A. The Act Permits Persons Subject to "Intellectual Deficiency or Emotional Unbalance" to Be Indefinitely confined Even if Treatment Is Unavailable.

Under Maryland law, a defective delinquent is defined as any individual who has been convicted of one or more of certain categories of criminal offenses[4] and who

> . . . , by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require *such* confinement and *treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment.* Annotated Code of Maryland, Article 31B, §5. (Emphasis added.)

As noted *supra,* this statute on its face does not pretend to limit confinement to confinement for treatment purposes. In fact the principal goal of the statute appears to be to confine those persons judged a "danger to society." That this is the principal goal is made particularly clear by the fact that the standard for release from Patuxent Institution is not exhaustion of resources to treat the individual but rather the safety of society. The principal goal of preventive detention is further disclosed by the inclusion in the statute of

---

[4]See *supra,* footnote 1.

"intellectual deficiency" as an alternative basis for indefinite commitment in the absence of "emotional unbalance." Since there is no known medical treatment to remedy intellectual deficiency, it is clear that a principal focus of the statute is not remediation of "disease" but preventive detention. For those persons for whom no effective treatment is known,[5] for whom treatment is judged inappropriate, or for whom treatment available at Patuxent Institution is inadequate, the Defective Delinquent Act provides no more than punishment and preventive detention.

The problem of detention without treatment is not simply a theoretical one. The principal type of therapy offered is group therapy. (App. 255.) In 1961, Patuxent Institution did not have a sufficient number of therapists to offer even group therapy to all of the inmates, and as a result the therapists were authorized to select the inmates they believed were most likely to benefit. (App. 252.) Staff members testified that at least 15% of the committed inmates receive no psychotherapy at all. The adequacy of both group therapy and the vocational and educational programs was subject to dispute during the trial. (App. 428, 415, 85, 120.) Yet none of the courts below actually confronted the treatment problem. Their conclusions that "All committed inmates are 'treatable', but not necessarily curable", 395 F.2d 387, 416, and that "the illness does not await the discovery of a cure," 221 A.2d 397, 417, beg the serious constitutional questions involved in civil detention without treatment.

---

[5]As noted *supra*, this includes virtually all of those determined to be intellectually deficient, for there is no effective treatment to provide a remedy for those unfortunates deemed in want of the intellectual resources nature has provided to others.

B. Persons Civilly Committed for Treatment Purposes Have a Constitutional Right to Treatment.

Assuming, *arguendo*, that confinement under the Maryland Act is "civil" as opposed to "criminal," the Act is nevertheless unconstitutional in that persons may be confined indefinitely without treatment. The problem of civil incarceration without treatment was recently before the United States District Court for the Middle District of Alabama in the case of *Wyatt v. Stickney*, 325 F.Supp. 781 (M.D. Ala. 1971). In a class action on behalf of patients at a large state mental hospital, Judge Franklin Johnson ruled that persons civilly committed for treatment purposes

> ". . . unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or improve his or her mental condition." 325 F. Supp. 784.

Failure to provide treatment for those persons deprived of their liberty "on the altruistic theory that the confinement is for humane therapeutic reasons" is deprivation of liberty without due process of law. 325 F.Supp. 785. He added that lack of staff or facilities does not justify inadequate treatment.

The principle of *Wyatt v. Stickney* applies equally to the Patuxent Institution. The inmates at Patuxent Institution are civilly committed in a proceeding which lacks the safeguards of an ordinary criminal trial. The theory behind their commitment is that they are intellectually deficient or emotionally unbalanced and therefore present more of a danger to society than the average criminal. The sentences for their original convictions have been suspended. If the institution to

which they are committed fails to provide treatment, then by being compelled to remain in that institution they are either being punished or preventively detained. Either punishment of preventive detention is a clear violation of their constitutional rights.

The power of the state to commit an individual for treatment for mental or physical illness arises out of the police power and the power of the state in *parens patriae*. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). See also *Buck v. Bell*, 274 U.S. 200 (1927). More recently, the Supreme Court stated in *Robinson v. California*, 370 U.S. 660 (1962), that the state may

> . . . determine that the general health and welfare require that the victims of [mental illness, leprosy and venereal disease] and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration . . . *Robinson, supra*, at 666.

The question which arises with respect to the Patuxent Institution is what to do when the quarantine, confinement, and sequestration are forthcoming but treatment is not.

C. Indefinite Commitment to the Patuxent Institution Without Treatment Is Punishment for Mere Status in Violation of the Prohibition Against Cruel and Unusual Punishment.

Any person confined without treatment under the Defective Delinquent Act is subjected to criminal penalties simply because of his status, *i.e.*, because he is "found to have such intellectual deficiency or emotional imbalance, or both, as to clearly demonstrate an actual danger to society. . . ." Such punishment is in violation of the cruel and unusual punishment clause

of the 8th Amendment. It was used as the example in *Robinson v. California* of what a state could not do. There this Court stated:

> It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. . . . [In the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. 370 U.S. 660, 666 (1962).

Punishment on the basis of defective delinquent status can not be justified on the grounds that the individual has been previously convicted of a crime. The effect of such a justification would be to allow a dual sentencing procedure under which some persons could be punished in excess of the statutory maximum for a given crime by "sentencing" them under the Defective Delinquent Act to an indeterminate sentence. Other persons convicted of the same offense could be sentenced to no more than the statutory maximum. Such a procedure would deny the inmate's right to equal protection of the law under *Williams v. Illinois*, 399 U.S. 235 (1970) where this Court held that the State of Illinois could not require indigents to serve a sentence in excess of the statutory maximum simply because they could not pay a cash fine.[6] Whatever the

---

[6]As in *Williams* the criterion which triggers a "sentence" in excess of the statutory maximum is an illegitimate one, related to the offender's mental defects or emotional instability. See *Robinson v. California, supra.* Moreover, the definitions used by Patuxent Institution to determine mental status include an

merits of its indeterminate sentencing,[7] discriminatory application renders it unconstitutional.

D. Indeterminate Commitment to Patuxent Institution Without Treatment Is Preventive Detention Depriving the Prisoner of His Liberty Without Due Process and in Violation of the Equal Protection Clause.

Each of the lower courts in this case recognized in their opinions that the primary purpose of the Defective Delinquent Act was to protect society from the criminal acts which the delinquents would perpetrate if they were at large. However, none of the courts below discussed the constitutional problems inhering in the preventive aspect of the act except to state that preventing anti-social conduct is a legitimate state function. The lower courts' analyses of the Act, never questioned its deleterious effect on the individual rights which limit state power.

A state can easily justify preventive detention if the only criterion is the safety of society. Preventing crimes before they occur has a peculiar persuasiveness.[8]

---

invidious possibility of racial bias. The institution defines intellectual deficiency according to scores on a standardized I.Q. test. This Court has recently noted that the use of such aptitude tests in employment is "fair in form, but discriminatory in operation." *Griggs v. Duke Power Company*, 401 U.S. 424 (1971). See also the discussion of the California experience with the problem of "middle class bias" in the criteria used by mental health professional in diagnosis. "The Dilemma of Mental Commitments in California," Subcommittee on Mental Health Services, California Legislature, Assembly Committee on Ways and Means, pp. 33-38 and Dr. Jane Mercer, "Socio-Cultural Factors in Labelling Mental Retardates," 48 Peabody Journal of Educ. 188 (April 1971).

[7]California has recently begun reconsideration of the merits of its indeterminate sentencing policy, see Appendix A.

[8]Note the Queen's argument to Alice:

"There's the King's Messenger. He's in prison now, being

(This footnote is continued on next page)

Preventive detention is not without precedent in the United States: its most infamous use was in the Japanese-American evacuation of World War II, *Hirabayashi v. U.S.*, 320 U.S. 81 (1942); *Korematsu v. U.S.*, 323 U.S. 214 (1944); its most prevalent use is to confine the mentally ill in circumstances in which treatment is purely custodial.[9] Despite these precedents, however, the constitutionality of preventive detention is not the closed question which the lower courts would have it.

The Maryland Defective Delinquent Act presents three serious constitutional problems with regard to persons for whom no treatment is provided. These problems cannot be avoided by simple references to the

---

punished: and the trial doesn't even begin till next Wednesday: and of course the crime comes last of all."

"Suppose he never commits the crime?" asked Alice.

"That would be all the better, wouldn't it?" the Queen responded. . . .

Alice felt there was no denying that. "Of course it would be all the better," she said: "But it wouldn't be all the better his being punished."

"You're wrong. . . ." said the Queen. "Were you ever punished?"

"Only for faults," said Alice.

"And you were all the better for it, I know?" the Queen said triumphantly.

"Yes, but then I had done the things I was punished for" said Alice: "That makes all the difference."

"But if you hadn't done them," the Queen said, "that would have been better still; better, and better, and better!" Her voice went higher with each "better," till it got quite to a squeak. . . .

Alice thought, "There's a mistake somewhere—"

L. Carroll, *Through the Looking Glass* 88 (Harper & Bros. ed. 1902).

[9]See Professor Alan Dershowitz, "Psychiatry in the Legal Process, A Knife That Cuts Both Ways," *Trial*, Feb./March 1968, p. 29.

civil nature of the proceedings and the state's police power. The Act:

1) Imposes a criminal penalty on the basis of a proceeding which fails to afford the subject the fundamentals of due process. (Section I, *supra.*)

2) Replaces the presumption of innocence with the presumption that given the opportunity, the subject confined would commit crimes.

3) Denies due process and equal protection in that it constitutes punishment in the absence of specific misconduct or an ascertainable standard of guilt.

The fact that the Defective Delinquent Act is in part couched in the language of psychiatric treatment makes it no less subject to constitutional safeguards. The words of Justice Brandeis are particularly appropriate in an age when we begin to allow circumvention of criminal law safeguards by invocation of psychiatric jargon.

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encorachment by men of zeal, well-meaning but without understanding.[10]

1. The Act Imposes a Criminal Penalty on the Basis of a Proceeding Which Fails to Afford the Fundamentals of Due Process.

Defective Delinquent proceedings fail to protect the accused's right to adequate notice, to avoid self-incrimination, to confront witnesses, to have the effective assistance of counsel, and to be proved guilty beyond a reasonable doubt. (See Argument, Part I.)

---

[10] *Olmstead v. United States,* 277 U.S. 438, 479 (1928), (dissenting opinion).

2. The Act Replaces the Presumption of Innocence With the Presumption That Given the Opportunity, the Subject Confined Would Commit Crimes.

Preventive detention under the Defective Delinquent Act is contrary in principle and application to the Anglo-American legal tradition of a presumption of innocence. Constitutional commitment to this principle is evident in the Eighth Amendment prohibition against excessive bail. In *Stack v. Boyle*, 342 U.S. 1 (1951), this Court held that the

> . . . traditional right to freedom before conviction . . . serves to prevent the infliction of punishment prior to conviction . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning. 342 U.S. 1, 4.

It is only logical that the right to remain at liberty prior to conviction includes the right to remain at liberty prior to any accusation of offense at all.

Use of bail to prevent speculative new offenses by one accused of a crime by imprisoning him prior to conviction has been held to be improper. *Davis v. U.S.*, 345 F.2d 441 (D.C. Cir. 1965), *cert. denied*, 385 U.S. 868 (1966). Justice Jackson, serving as a Circuit Judge in the case of *Williamson v. U.S.*, 184 F.2d 280 (2d Cir. 1950), concerning bond pending an appeal of conviction of violation of the Smith Act emphasized the dangers inherent in preventive detention whether in the bail setting or elsewhere:

> If I assume that defendants are disposed to commit every opportune disloyal act helpful to Communist countries, it is still difficult to reconcile with traditional American law the jailing of

> persons by the courts because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it, even as a discretionary judicial technique to supplement conviction of such offenses as those of which defendants stand trial. 184 F.2d 280, 282-83.

Nevertheless, the lower courts in the case before the Court refused to question the use of the Defective Delinquent Act to incarcerate persons until it is "safe for society to terminate confinement. . . ." The fact that the "defective delinquents" have been convicted of a criminal offense prior to commitment under the act does not militate against the injustice of presuming future criminal acts. The violation inheres in the preventive detention and indeterminate sentence, which bear no necessary relation to the maximum statutory sentence of the crime for which the "delinquent" was originally convicted. (See discussion of *Williams v. Illinois, supra,* pp. 28-29.)

3. The Act Denies Due Process and Equal Protection in That It Constitutes Punishment in the Absence of Specific Misconduct and Without an Ascertainable Standard of Guilt.

Prosecution to invoke the preventive detention provisions of the Defective Delinquent Act "means the making of a new charge leading to criminal punishment," *Specht v. Patterson,* 386 U.S. 605, 610 (1967). Prosecution and detention on the basis of this "new charge", however, is uncontitutional in that the charge includes no specific prohibited conduct or *actus reus,* thus defying adequate answer to defense by the ac-

cused and delegating authority to define the "crime" to judges, juries and psychiatrists. In *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1920), this Court outlined standards for ascertaining whether a statute

> . . . constituted a fixing by Congress of an ascertainable standard of guilt and [is] adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them, . . . *Id.* at 89.

To do so, the statute must a) forbid a "specific or definite act," b) confine "the subject-matter of the investigation," and c) fix an "immutable standard of guilt," *Id.* at 87 and 89. In applying these criteria to a section of the Lever Act regulating prices, this Court found that the statute

> . . . forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. At 89.

Like the statute in question in the *L. Cohen Grocery Co.* case, the Maryland Defective Delinquent Act fails

to charge the suspect with commission of any specific act. It opens the investigation to any conceivable event in the suspect's lifetime. Finally it abdicates legislative authority to define crime to the trier of fact and to the experts. These deficiencies render it virtually impossible for one accused under the Act to defend himself. Professor Laurence H. Tribe has described this problem in a recent article on preventive detention in the context of setting bail:

> The real vice of the accusation of dangerousness underlying this proposed statutory scheme is not that it looks to the future but that its content is so amorphous. Imagine again the impact on the accused. He is told: There is a substantial probability that you have committed a crime and that your release would endanger the community in some unspecified way. We know you can control your behavior, for we are about to try you as a criminal, but we do not trust you to refrain from crime. How could the accused possibly respond? Would he not feel, with Kafka's bewildered hero in *The Trial*, that the completion of a responsive "plea was a sheer impossibility?" For the accused to meet this openended and ultimately personalized sort of "accusation . . . the whole of [his] life would have to be recalled to mind, down to the smallest actions and accidents, clearly formulated and examined from every angle."
>
> "An Ounce of Detention: Preventive Justice in the World of John Mitchell," 56 Va. L. Rev. 371, 393 (1970).

The abdication of definition of crime is an equally serious problem. The problem in preventive detention

based on the definition of defective delinquent in the statute is the same problem which Justice Burger discussed in his concurrence in *Blocker v. U.S.*, 288 F.2d 853 (D.C. Cir. 1961):

> . . . no rule of law can possibly be sound or workable which is dependent upon the terms of another discipline whose members are in profound disagreement about what those terms mean. How can lay jurors possibly understand and apply terms whose meaning is unclear to acknowledged experts? This is not simply a matter of experts disagreeing on opinions or on diagnoses, which often occurs, but disagreement at the threshold on what their own critical terms mean. At 860.

Professor Dershowitz has also discussed the problem of asking the ultimate question in medical rather than legal terms. He states that

> . . . the medical model does not ask the proper questions, or asks them in meaningless vague terms: Is the person mentally ill? Is he dangerous to himself or others? Is he in need of care or treatment? "Psychiatry in the Legal Process: A Knife That Cuts Both Ways, Feb./March 1968 *Trial*, p. 29, 30.

Dershowitz points out that the error in the medical approach stems from the fact that

> . . . the question of which harms do, and which do not, justify incarceration is a legal—indeed a political—decision, to be made not by experts, but by the constitutionally authorized agents of the people. At 31.

He goes on to state that the questions which the legislature should answer rather than leave to the personal philosophies of diverse psychiatrists, judges and jurors include the following:

> What sorts of anticipated harm warrant involuntary confinement?
>
> How likely must it be that the harm will occur? Must there be a significant component of harm to others, or may the harm be to self alone?
>
> If harm to self is sufficient, must the person also be incapable, because he lacks insight, of weighing the risks to himself against the costs of confinement?
>
> How long a period of involuntary confinement is justified to prevent which sorts of harms? Must the likelihood of the harm increase as its severity decreases? Or as the component of harm to other decreases? At 31.

Where the legislature has made no such finding, the statute must be held invalid for the reasons stated in *L. Cohen Grocery Co.*

Conclusion.

The Maryland Defective Delinquent Act might best be compared to the New Jersey "Gangster" statute held unconstitutional in *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). That statute, though drafted in less sophisticated, non-pyschological terms, made it a crime to be a gangster. A gangster was defined as

> [a]ny person not engaged in any lawful occupation, known to be a member of any gang con-

> sisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or any other state. . . . 306 U.S. 451, 452.

The New Jersey courts had upheld the statute, stating that:

> The manifest purpose of this legislation is to check evil in its beginning, and thus to insure the public safety. The statute is not arbitrary or unreasonable. It provides for the apprehension and punishment of a class that menaces the security of persons and property. . . . It is the undoubted function of the state to apprehend those who would violate laws ordained to protect the person and property of citizens, and who are seeking the opportunity to do so. Such persons are determined and ever active foes of society. *State v. Bell,* 188 Atl. 737, 738 (19....).

This Court overruled the statute on the ground that

> [n]o one may be required at the peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. 306 U.S. 451, 453.

The preventive detention provisions of the statute before the Court is remarkably similar, simply more sophisticated in that it replaces the vagaries of language with the vagaries of experts. It has been justified by the lower courts on the same grounds of public security and with parallel disregard for the individuals whose rights are abridged. The Maryland Defective Delin-

quent Act is one step more repressive than the gangster statute; unlike gangsters defective delinquents are not even provided the safeguards of a criminal trial.

ALAN F. CHARLES,
LAURENS H. SILVER,
SHELLEY MERCER,
JOANNE B. STERN,
Attorneys for Amicus Curiae National Legal Program on Health Problems of the Poor.

EXHIBIT A.

Los Angeles Times Tues., Nov. 16, 1971—Part I

Parole Plan to Reduce Prison Violence Voted

Tentative Release Dates Would Be Given to Inmates in Hope of Improving Behavior

By William Endicott
Times Staff Writer

SACRAMENTO—The California Adult Authority, in a move to curb violence in the state's prisons, voted Monday to set contingency release dates for hard-core inmates housed in isolation and segregation sections, commonly known as "adjustment centers."

The state's top prison official, Raymond K. Procunier, predicted the result would be "a miracle" in rehabilitation.

"If something like this doesn't happen," said Procunier, director of the state Department of Corrections, "we're not going to be operating with any order very much longer."

The action reflects a major change in Adult Authority policy and strongly implies that the concept of adjustment centers for incorrigible inmates has failed.

It also was the authority's second step toward reform in the past month.

Release Dates Endorsed

In mid-October, it endorsed giving contingency release dates to most prisoners as soon as possible after they are committed, a move officials hope will sharply reduce the need for adjustment centers.

The theory is that inmates given a tentative parole date at the outset will then be less apt to be in troublesome.

The specifics of both actions and how they will be implemented still are to be worked out.

Previously, the Adult Authority, which supervises paroles, would not grant a parole date to an adjustment center inmate until that inmate had "worked his way out of the center."

Authority member James H. Hoover of Chino, the chief proponent of the new policy, said that when adjustment centers were created in the 1950s they were hailed as a major solution to prison problems.

"Many administrators felt that if they could just get rid of that 1 or 2% of the inmates who were causing most of the problems the institution would run smoothly," Hoover said.

"This hasn't proven out, however . . . Rather than solving all the problems they have become a major source of trouble for the institution."

Adjustment Center Origin

Hoover said that almost all the fatal and critical assaults on prison staff over the last two years either happened, or had their origin in something that happened in an adjustment center.

"They are on the verge of being unmanageable," he said. "In almost all the adjustment centers, the necessary use of considerable force to get certain inmates in and out of their cells is a daily occurrence."

Prison officials believe one major reason for many of the problems is that the hard-core inmates have lost all hope of ever getting out of prison and on parole.

"Faced with this hopelessness, they have become little more than animals," Hoover said.

By granting parole dates, officials believe, many adjustment center inmates—who presently number 850 or about 5% of the total male prison population in the state—may be motivated "to conform to institutional rules . . ."

Hoover said that in addition to curbing violence, the new policy hopefully will reduce the number of inmates in adjustment centers and the average length of their stay.

Inmates normally are confined in the centers either for disciplinary reasons or because they are considered too dangerous to live with other prisoners.

2 Los Angeles Times January 19, 1972 Part II

Parole Reform

California has adopted another promising reform in its treatment of prison inmates. Under a new parole system effective Feb. 1, most of the state's convicts will receive a tentative release date within six months after they enter the prison system. Exceptions will be those with special disciplinary or mental problems.

Arguments for the reform were persuasive, chief among them being that the old system was not achieving its desired end. Twenty-eight years ago the state adopted the indeterminate sentence for convicts. Offenders were not sentenced to prison for a specific period, but "for the term prescribed by law." This gave the Adult Authority the power to tailor the time served to fit each individual case.

Progressive in theory, the indeterminate sentence came under increasing criticism as regressive in prac-

tice. In 80% of the cases, prisoners did not receive a release date until after the Adult Authority had acted favorably on parole applications. Prisoners could never be certain of a release date, and this reduced their motivation and hindered their efforts at rehabilitation.

Prisoners will now receive "contingency parole dates" but to gain their release they will have to complete training courses and maintain good behavior. The new system not only places the burden on the inmate for his release but provides him with an incentive to "learn and earn" his way out of prison. Raymond Procunier, director of the State Department of Corrections, stressed the chief defect of the present parole system by pointing to the fact that convicts see "no connection between their behavior and when they are released." Significantly, all but one of the state's prison wardens view the reform as one way to "make the institutions run cooler."

Prison officials cannot be certain their new approach toward rehabilitation will be effective, but they do know that the present system is not working.

Los Angeles Times Tues., Jan. 18, 1972—Part I

STATE WILL START NEW PAROLE SYSTEM FEB. 1

Adult Authority to Set Date of Release Early in Sentence

SACRAMENTO (UPI)—The state Adult Authority voted 6 to 2 Monday to give every California convict a tentative release date so he can "learn and earn" his way out of prison.

The "contingency parole dates" will be set after a personal interview with each convict by members of

the authority within six months of the date the inmate enters the prison system. The Adult Authority, under California law, has the responsibility of deciding when each inmate is released from prison.

The new system, which will take effect Feb. 1, is a major modification of the state's much-criticized indeterminate sentencing laws. Formerly, convicts were not told when they would get out of prison until they had served enough time to be considered "rehabilitated."

Must Complete Courses

To earn their release under the new system, they will have to complete personally selected training courses and maintain good behavior. Special cases—such as inmates with disciplinary or mental problems—will not be given dates until their behavior improves.

Adult Authority vice chairman Curtis O. Lynum, a former FBI agent, said promising the inmates a parole if they behave and complete their training "places the burden on the inmate for his release."

He said that all but one of the state's prison wardens told him that making the convicts "learn and earn" their way out would "make the institutions run cooler."

State prisons chief Raymond Procunier said he supported the plan because it "will tell a man when he's going to go home." Right now, he said, convicts see "no connection" between their behavior and when they are released.

Change Strongly Opposed

Authority member Leland Edman, a former prosecuting attorney from Fresno, strongly opposed the change. He said setting the dates in advance was "out-

landish speculation" and that inmates are given parole dates "at the earliest practical" time now.

Panel member Manley J. Bowler of Los Angeles joined Edman in voting against the proposal. Bowler said the plan was impractical because "we're dealing today with a different kind of human animal."

"We're getting the scrapings of the bottom of the barrel," he said.

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
FEB 14 1972
ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-5276

ALBERT D. MUREL, *et al.*,

Petitioners,

v.

BALTIMORE CITY CRIMINAL COURT, *et al.*,

Appellees.

BRIEF OF THE PETITIONERS

KARL G. FEISSNER
WILLIAM L. KAPLAN
THOMAS P. SMITH
FRED R. JOSEPH
ANDREW E. GREENWALD
WALTER E. LAAKE, JR.
Feissner, Kaplan & Smith
6401 New Hampshire Avenue
Hyattsville, Maryland 20783
Attorneys for Petitioners

Washington, D. C. · THIEL PRESS · 202 393-0625

TABLE OF CONTENTS

	Page
OFFICIAL AND UNOFFICIAL REPORTS	1
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
QUESTIONS PRESENTED FOR REVIEW	5
APPENDIX DESIGNATION	7
STATEMENT OF THE CASE	7
SUMMARY OF THE ARGUMENT	20
ARGUMENT:	
I. The Maryland Defective Delinquent Statute Is Unconstitutionally Vague	22
II. The Procedures Embodied in the Statute and in Trial Are Applied in Such a Manner as To Offend the Due Process Requirements of the Fifth Amendment and the Confrontation Requirements of the Sixth Amendment	27
III. The Proposed Objectives of the Act Are Not Being Sufficiently Implemented To Support Its Characterization as a Civil Procedure and To Justify the Elimination of Conventional Criminal Procedure Safeguards	38
IV. The Eighth Amendment Provisions Against Cruel and Unusual Punishment Are Offended When the Statutory Requirement That a Defective Delinquent Be an "Actual Danger to Society" Is Being Applied to Offenses Against Property as Well as Violence Against Persons	43
V. The Patuxent Institution Does Not Furnish Sufficient Actual Treatment To Distinguish Its Inmates from Those of Other Penal Institutions so as To Satisfy the Equal Protection Clause of the Fourteenth Amendment	46

VI. Constitutional Guarantees of Due Process and Equal Protection Were Violated When the Petitioners Were Denied Leave To Employ Independent Psychiatric Experts at Government Expense 49

VII. The Petitioners Were Denied Due Process of Law by the Initiation of Commitment Proceedings Under a Statute That Requires Allegations of Mere Supposition or Suspicion of Defective Delinquency and Where That Statute Permits a Court Order To Be Entered *Ex Parte* Without Notice or Hearing and Without the Assistance of Any Counsel for the Accused 54

VIII. Petitioners Were Deprived of Due Processes of Law During the Examination Stage of Their Confinement at Patuxent and/or in the Finding by the Institution of Their Defective Delinquency as a Result of the Patently Inherent Unreliability of the Fact-Finding Processes and the Essential Procedural Unfairness of Administrative Adjudication by the Institution Itself 57

IX. Petitioners' Rights Against Self-Incrimination Are Violated by the Unyielding Compulsion upon Persons Sent to Patuxent for Examination To Submit to In-Depth Interrogation and Testing in the Total Absence of Procedural Safeguards 68

X. Petitioners' Rights To Confront and Examine Witnesses Against Them in a Judicial Hearing for Determination of Their Defective Delinquency Are Inadequately Preserved by the Statutory Scheme of Defective Delinquent Proceedings 73

XI. The Standard of "Clear and Convincing Evidence" or "Beyond a Reasonable Doubt" Should Have Been Used by the Maryland Courts at the Commitment Proceedings, Rather Than the Standard of "Preponderance of the Evidence" 75

XII. Petitioners Were Unconstitutionally Required To Incriminate Themselves by the Statutory Procedures for Review and Re-examination of Their Commitments 76

XIII. The District Court and the United States Court of Appeals for the Fourth Circuit Erred in Finding That the Maryland Act Is Constitutional on Its Face, Interpretation, Application, Administration, and Result 78

CONCLUSION 84

TABLE OF AUTHORITIES

Cases:

Avey v. Boslow, 385 U.S. 940 (1966) 43

Baggett v. Bullit, 377 U.S. 360 (1964) 23

Barber v. Page, 390 U.S. 719 (1968) 75

Baxtrom v. Herold, 383 U.S. 107 (1966) 30, 36, 46

Beck v. Ohio, 379 U.S. 89 (1964) 55

Blann v. Director, 235 Md. 661, 202 A.2d 722 (1964) . . . 36, 65, 72

Blizzard v. Maryland, 218 Md. 384, 147 A.2d 227 (1958) . . . 38, 39

Bolten v. Harris, 395 F.2d 642 (D.C. Cir. 1968) 81

Boyd v. United States, 116 U.S. 616 (1886) 22

Britton v. Maryland, 298 F. Supp. 641 (D.C. Md. 1969) 75

Bullock v. Director, 231 Md. 629, 190 A.2d 789 (1963) 39

Bush v. Texas, 372 U.S. 586 (1963) 50

Camparella v. Maryland, 214 Md. 355, 135 A.2d 311 (1957) . . . 23

Carter v. Director, Patuxent Institution, 10 Md. App. 247, 269 A.2d 172 (1970) 54

Costello v. Immigration and Naturalization Service, 376 U.S. 120 (1964) 22

Cowman v. Maryland, 220 Md. 297, 151 A.2d 903 (1959) 44

Crews v. Director, 245 Md. 174, 225 A.2d 436 (1967) 44, 75

Cross v. Harris, 135 U.S. App. D.C. 259, 418 F.2d 1095 (1969) 37, 80

Daniels v. Director, 238 Md. 80, 206 A.2d 726 (1965) 7, 8

Daugherty v. Maryland, 355 F.2d 803 (4th Cir. 1966) 54

Director v. Daniels, 243 Md. 16, 221 A.2d 397 (1966) ..... passim
Draper v. Washington, 372 U.S. 487 (1963) 50
Eggleston v. Maryland, 209 Md. 504, 121 A.2d 698 (1956) ...35, 41
Fleuti v. Rosenberg, 302 F.2d 652 (9th Cir. 1962) 24
Gercham v. Maroney, 355 F.2d 302 (3rd Cir. 1966) 74
Gideon v. Wainwright, 372 U.S. 335 (1963) 32
Gilbert v. California, 388 U.S. 263 (1967) 67
Gray v. Director of Patuxent Institution, 245 Md. 80, 224 A.2d 879 (1966) 39, 58
Greer v. Beto, 379 F.2d 923 (5th Cir. 1967) 51
Griffin v. Illinois, 351 U.S. 12 (1966) 50
Hall v. Director, 245 Md. 687, 226 A.2d 669 (1967) 38
Herrman v. Director, 229 Md. 613, 182 A.2d 351 (1962) 38
Heflin v. United States, 358 U.S. 415 (1959) 22, 25
Holm v. Wyoming, 404 P.2d 704 (1965) 37
Hoverter v. Director, 231 Md. 608, 188 A.2d 696 (1963) 27
In re Gault, 387 U.S. 1 (1967) 56, 57. 71
In re Oliver, 333 U.S. 257 (1948) 22
In re Winship, 397 U.S. 358 (1970) 44
Johns v. Director, 239 Md. 411, 211 A.2d 751 (1965) 73
Kennedy v. Mendosa-Martinez, 372 U.S. 144 (1962) 79
Kent v. United States, 383 U.S. 541 (1966) 55
Lanzetta v. New Jersey, 306 U.S. 451 (1939) 23, 24
Leland v. Oregon, 343 U.S. 790 (1951) 52
Long v. District Court of Iowa, 385 U.S. 192 (1966) 50
Lynch v. Overholser, 369 U.S. 705 (1962) 27
Malloy v. Hogen, 378 U.S. 1 (1964) 32, 70
Maryland v. Musgrove, 241 Md. 521, 217 A.2d 247 (1966) ... 54, 69
Mason v. Superintendent, 233 N.E.2d 908 (Mass. 1968) 35
Mastromarino v. Director, 244 Md. 645, 224 A.2d 674 (1966) 39, 73
McCarthy v. Arndstein, 266 U.S. 34 (1924) 33

McCloskey v. Director, 230 Md. 635, 187 A.2d 833 (1963) ... 39
McDonough v. Director, 229 Md. 626, 183 A.2d 368 (1962) ... 27, 31, 33, 38
Meredith v. Director, 226 Md. 653, 172 A.2d 501 (1961) ... 38
Miller v. Blalock, 356 F.2d 273 (4th Cir. 1966) ... 55, 65
Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940) ... 24, 31, 44
Murphy v. Waterfront Commission, 378 U.S. 52 (1964) ... 70
New Jersey v. Whitlow, 45 N.E. 3, 210 A.2d 763 (1965) ... 36, 52, 66
Oregon v. Hodges, 457 P.2d 491 (Ore. 1970) ... 25, 26
Orozco v. Texas, 394 U.S. 324 (1969) ... 71
Palmer v. Maryland, 215 Md. 142, 137 A.2d 119 (1957) ... 23, 26, 44
Pennsylvania v. Pifer, 269 A.2d 909 (Pa. 1970) ... 36
Pointer v. Texas, 389 U.S. 400 (1965) ... 33, 35, 74
Purks v. Maryland, 226 Md. 43, 171 A.2d 726 (1961) ... 38, 58, 75
Queen v. Director, 226 Md. 664, 174 A.2d 351 (1961) ... 28
Reed v. Warden, 212 Md. 645, 129 A.2d 92 (1957) ... 44
Reid v. Covert, 354 U.S. 1 (1957) ... 22
Roberts v. Director, 226 Md. 43, 172 A.2d 889 (1961) ... 38
Roberts v. LaVallee, 289 U.S. 40 (1967) ... 50
Robinson v. California, 370 U.S. 660 (1962) ... 44, 45
Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966) ... 35
Sas v. Maryland, 295 F. Supp. 389 (D. Md. 1969) ... passim
Sas v. Maryland, 334 F.2d 506 (4th Cir. 1965) ... 8, 24, 43
Schlatter v. Director, 238 Md. 132, 207 A.2d 653 (1965) ... 58
Shields v. Director, 244 Md. 710, 224 A.2d 107 (1966) ... passim
Skinner v. Oklahoma, 316 U.S. 535 (1942) ... 29, 30
Smith v. Bennett, 365 U.S. 708 (1961) ... 49
Specht v. Director, 243 U.S. 734, 223 A.2d 263 (1966) ... 74
Specht v. Patterson, 386 U.S. 605 (1967) ... 36, 74, 80
Spinelli v. United States, 393 U.S. 410 (1969) ... 55
Terminiello v. Chicago, 337 U.S. 1 (1949) ... 44

Terry v. Ohio, 392 U.S. 1 (1968) 55
Thornton v. Corcoran, 407 F.2d 695 (D.C. Cir. 1969) 66
Timmons v. Peyton, 360 F.2d 327 (4th Cir. 1966) ... 36, 50, 55, 65
Tippett v. Maryland, 436 F.2d 1153 (4th Cir. 1971) 8, 43, 45
Turck v. Director, 236 Md. 653, 205 A.2d 397 (1964) 38
United States v. Albright, 338 F.2d 719 (4th Cir. 1968) 65
United States v. Brown, 381 U.S. 437 (1965) 34, 35
United States v. Driscoll, 399 F.2d 135 (2nd Cir. 1968) 36, 65
United States ex rel. Mignozzi v. Day, 51 F.2d 1019 (2nd Cir. 1931) 22
United States ex rel. Shuster, 410 F.2d 1071 (2nd Cir. 1969) ... 35
United States v. Wade, 388 U.S. 263 (1967) 67
Walker v. Director, 6 Md. App. 206, 150 A.2d 900 (1969) .. 38, 74
Wampler v. Warden, 218 F. Supp. 876 (D.C. Md. 1963) 33
Williams v. Blalock, 280 F. Supp. 298 (W.D. Va. 1968) 65
Winter v. New York, 333 U.S. 507 (1948) 23

Legal Reviews and Journals:

46 Am. Bar Assoc. J. 499 35
118 U. Pa. L. Rev. 448 (1970) 72
77 Yale Law J. 87 35

Miscellaneous:

Arieti, *American Handbook of Psychiatry* 30
Boslow, *The Maryland Defective Delinquency Law* 10, 31, 32
Boslow, *Methods and Experience in Group Treatment* 10
Boslow, *The Maryland Defective Delinquency Law An Eight Year Follow Up* 11, 40
Lindman and McIntyre, *Mentally Disabled and the Law*..... 30, 64

APPENDIX

Appendix A	–	Art. 31B of the Anotated Code of Maryland	1a
Appendix B	–	Letter, dated 5/12/70, Supplementary Record in Appeal 13,415, et. seq. in The United States Court of Appeals for the Fourth Circuit	1b

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-5276

ALBERT D. MUREL, *et al.*,

Petitioners,

v.

BALTIMORE CITY CRIMINAL COURT, *et al.*,

Appellees.

BRIEF OF THE PETITIONERS

OFFICIAL AND UNOFFICIAL REPORTS of the Opinions delivered in the Courts below

A. *Daniels v. Director*, 238 Md. 80, 206 A.2d 726 (Md. 1965).

B. *Director v. Daniels*, 243 Md. 16, 221 A.2d 397 (Md. 1966), cert. denied *sub. nom. Avey v. Boslow*, 87 S. Ct. 307, 385 U.S. 940, 17 L. Ed. 2d 219 (1966).

C. *Sas, et al. v. State of Maryland*, 295 F. Supp. 389 (D.C. Md. 1969).

D. *Tippett, et al. v. State of Maryland, et al.*, 436 F.2d 1153 (4th Cir. 1971).

JURISDICTION

The jurisdiction of this Honorable Court is respectfully invoked pursuant to the provisions of Title 28, U.S. Code, Sec. 1254 (28 U.S.C. 1254). The judgment sought to be reviewed was entered by the United States Court of Appeals for the Fourth Circuit on January 4, 1971. A Petition for rehearing and rehearing *en banc* was timely filed and was denied on March 11, 1971 by the United States Court of Appeals for the Fourth Circuit.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. Amendment V, United States Constitution:

> ". . . No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury except in cases arising in the land or Naval Forces or in the militia when an actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law . . ."

B. Amendment VI, United States Constitution:

> ". . . In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense."

C. Amendment VIII, United States Constitution:

> ". . . excessive bail shall not be required nor excessive fines imposed nor cruel and unusual punishments inflicted.

D. Amendment XIV, United States Constitution:

> ". . . No state shall make or enforce any law which shall abridge the privilege or immunities of the citizens of the United States nor shall any State deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws . . ."

E. Article 31B of the Annotated Code of Maryland (fully set out in Appendix A), and especially Sec. 5 of Article 31B of the Annotated Code of Maryland, set forth below:

> ". . . for the purposes of this article a defective delinquent shall be defined as an individual who by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity and who is found to have either such intellectual deficiency or emotional unbalance or both as to clearly demonstrate an actual danger to society so as to require such confinement and treatment when appropriate as may make it reasonably safe for society to terminate the confinement and treatment . . ."

F. Article 31B, Section 10, Annotated Code of Maryland *Petition for Review:*

> "(a) Who may file; hearing and determination.– After any person shall have been committed under Sec. 9(b) as a defective delinquent, shall have been confined for a total period, including any period of confinement under his original sentence prior to commitment under Sec. 9(b), equal to two thirds of his original sentence, such person or anyone in his behalf, including the director or any officer or employee of Patuxent Institution, may file a petition requesting that such person be brought before the court in which such petition is filed for the purpose of having the defective delinquency of such person redetermined. . . .
>
> "(b) Application for further review not to be made within three years.– After the right to apply for any such petition for review under the provisions of

this section shall have been exercised once, it shall not again be sought under the provisions of this section within less than three years following the prior seeking of a petition for review from confinement under the same commitment.

"(c) Right to petition for habeas corpus not affected.– The right to review specified in this section shall not be construed to deprive the defendant of his right to petition for habeas corpus as it might otherwise exist."

* * * * * *

"(g) Affidavit required for subsequent petition within one year.– Once a patient has had a determination on the merits of any one petition filed by him pursuant to this section, no subsequent petition prepared by or for him shall be heard by a court of equity within one year of such prior determination, unless, in addition to all other required data, the petition is accomplished by a valid affidavit showing improvement of the patient's mental condition subsequent to the trial. No such affidavit shall be valid if executed by a patient of a private facility or Veterans' Administration hospital. When filed, the petition and affidavit shall be reviewed by the court, and if the affidavit shows an improvement in the patient's mental condition, the petition shall be heard as provided in this section. If no substantial improvement in such condition is shown, the petition shall be dismissed.

G. Article 50, Section 14, Annotated Code of Maryland, *Habeas corpus:*

"(a) At any time, any person admitted to any facility or Veterans' Administration hospital, or anyone, on his behalf, may apply to any appropriate court for a writ of habeas corpus. Such proceeding shall be available to determine the cause and the legality of his admission and continued detention."

H. Article 59, Section 15, Annotated Code of Maryland, *Judicial release:*

"(a) Petition to be filed; respondent.– Any patient may, at any time, subject to the limitations specified in this section, file a petition in the equity court of the county in which he resides or resided at the time of his admission, or in which he is confined for the purpose of securing his release. Any person having a legitimate interest in the welfare of the patient may file the petition on his behalf. The Department shall be the respondent in any such case, unless the patient is a patient in a private facility or a Veterans' Administration hospital, in which case the private facility or the Veterans' Administration hospital shall be named as the respondent."

* * * * *

"(c) Trial by jury.– The petitioner may request that his petition be heard by a jury, and thereafter such trial shall proceed as in a civil action at law.

QUESTIONS PRESENTED FOR REVIEW

A. Whether the Maryland Defective Delinquent Statute is unconstitutionally vague.

B. Whether the procedures embodied in the statute and in trial are applied in such a manner as to offend the due process requirements of the Fifth Amendment and the confrontation requirements of the Sixth Amendment.

C. Whether the proposed objectives of the act are being sufficiently implemented to support its characterization as a civil procedure and to justify the elimination of conventional criminal procedural safeguards.

D. Whether the Eighth Amendment provision against cruel and unusual punishment is offended when the statutory requirement that a defective delinquent be an "actual danger to society" is being applied to offenses against property as well as violence against persons.

E. Whether the Patuxent Institution furnishes sufficient actual treatment to distinguish its inmates from those of

other penal institutions so as to satisfy the equal protection clause of the Fourteenth Amendment.

F. Whether constitutional guarantees of due process and equal protection were violated when the Petitioners were denied leave to employ independent psychiatric experts at government expense.

G. Whether the Petitioners were denied due process of law by the initiation of commitment proceedings under a statute that requires allegations of mere supposition or suspicion of defective delinquency and where that statute permits a court order to be entered *ex parte* without notice or hearing and without the assistance of any counsel for the accused.

H. Whether the Petitioners were deprived of due process of law during the examination stage of their confinement at Patuxent and/or in the finding by the institution of their defective delinquency as a result of patently inherent unreliability of the fact-finding processes and the essential procedural unfairness of administration adjudication by the institution itself.

I. Whether the Petitioners' rights against self-incrimination are violated by the unyielding compulsion upon persons sent to Patuxent for examination to submit to in-depth interrogation and testing in the total absence of procedural safeguards.

J. Whether Petitioners' rights to confront and examine witnesses against them in a judicial hearing for determination of their defective delinquency are adequately preserved by the statutory scheme of defective delinquent proceedings.

K. Whether the standard of "clear and convincing evidence" or "beyond a reasonable doubt" should have been used by the Maryland courts at the commitment proceedings, rather than the standard of "preponderance of the evidence."

L. Whether the Petitioners were unconstitutionally required to incriminate themselves by the statutory procedures for review and re-examination of their commitments.

M. Whether the District Court and the United States Court of Appeals erred in finding that the Maryland act is constitutional on its face, interpretation, application, administration and result.

APPENDIX DESIGNATION

In order to reduce costs the parties have agreed to the use of appendices heretofore used in the United States Court of Appeals for the Fourth Circuit and in the Court of Appeals of Maryland. The two volume joint Appendix used in the Fourth Circuit Court of Appeals will be hereinafter designated as "(J.A. 4)."

The two-volume Joint Appendix used in the Court of Appeals of Maryland which was evidentiarily accepted in the hearing before the United States District Court for the District of Maryland in the matter of *Sas, et al. v. State of Maryland*, 295 F. Supp. 389 (D.C. Md. 1969), will be hereinafter designated as "(J.A. Md.)."

The Appendices not printed are original exhibits used in the District Court. They will be referred to by their exhibit number in that court; *i.e.* "(Ex.)."

STATEMENT OF THE CASE

These cases had their genesis from legal proceedings begun on two (2) different fronts. On July 22, 1964 in the Circuit Court of Prince George's County, Maryland trial was had in *State of Maryland v. Samuel Daniels* for a determination as to whether or not the Defendant was a defective delinquent (J.A. Md. 388). After trial the Defendant was found to be a defective delinquent; on appeal the cause was reversed. *Daniels v. Director*, 238 Md. 80, 206 A.2d 726

(Md. 1965), and the matter remanded to the Trial Court for consideration of the constitutional questions raised. During the same period of time the United States Court of Appeals for the Fourth Circuit rendered its decision in *Sas v. Maryland*, 334 F.2d 506 (4th Cir. 1964). That opinion remanded the *Sas* case to the District Court for a broad analysis of the Patuxent Institution. The Court of Appeals of Maryland in its decision, *Daniels v. Director, supra*, directed the trial judges in the Circuit Court of Prince George's County to conduct a *Sas*-type hearing into the overall nature of Patuxent which was done and in due course an opinion was rendered upholding the Patuxent Institution (J.A. Md. 1). On appeal the decision of the Circuit Court of Prince George's County was upheld in *Director v. Daniels*, 243 Md. 16, 221 A.2d 397 (Md. 1966), and on writ of *habeas corpus*, the *Avey-Daniels* record was joined with the *Sas* remand cases, which were then consolidated with several pending cases in the United States District Court for the District of Maryland. After trial, and in due course, an opinion was rendered by the United States District Court for the District of Maryland upholding the constitutionality of Patuxent after considering the record made in the Maryland Courts. *Sas, et al. v. State of Maryland*, 295 F. Supp. 389 (D.C. Md. 1969). On appeal to the United States Court of Appeals for the Fourth Circuit, the decision of the District Court was upheld (2 to 1) *sub nom. Tippett, et al. v. State of Maryland, et al.*, 436 F.2d 1153 (4th Cir. 1971), and this Court, in its wisdom, granted its writ of *certiorari*.

The Petitioners in this cause all have a similar history. After conviction in the Circuit Courts of Maryland they were classified as "defective delinquents" pursuant to the provisions of Article 31B of the Annotated Code of Maryland, and sent to the Patuxent Institution in Jessup, Maryland. Finding no relief in the State Courts of Maryland they filed their writs in the United States District Court of Maryland and from the adverse rulings, which were affirmed on appeal by the United States Court of Appeals for the Fourth Circuit, they appear before this Court.

The Patuxent Institution was opened in January 1955 (J.A. Md. 615). The Institution covers approximately ten (10) acres of ground and consists of a complex of facilities enclosed by a fence with six (6) guard towers (J.A. Md. 616). There were at the time of the original Maryland hearings four hundred and eighty-five (485) people incarcerated within the Institution.

An inmate qualifies for Patuxent when he becomes or is determined to be a defective delinquent. A defective delinquent is defined as "an individual who by the demonstration of persistent aggravated anti-social or criminal behavior, evidences a propensity towards criminal activity and who is found to have either such intellectual deficiency or emotional unbalance or both as to clearly demonstrate an actual danger to society so as to require such confinement and treatment when appropriate as may make it reasonably safe for society to terminate the confinement and treatment." Sec. 5, Art. 31B, *The Annotated Code of Maryland.* The trials of inmates which have been reproduced for this Court are Daniels (J.A. 4, 388); Tippett (Ex. 12-15); Murel (Ex. 10-11); and Creswell (Ex. 9). They indicate the pattern that when an individual is sent to Patuxent Institute he is examined by the staff and the staff makes a report to the Court as to whether or not in their opinion the individual is or is not a defective delinquent. If the staff determines that he is not a defective delinquent then the matter is put at rest and there is no appeal by public authority or otherwise against the staff's findings. If, on the other hand, the staff determines that he is, in fact, a defective delinquent then a trial is held in a Circuit Court before judge or jury and the state psychiatrist who examined the defendant is then called to express his opinion as to whether or not the individual is a defective delinquent and the reasons therefor. The judge or jury then makes a determination and if, in fact, the individual is denominated as a defective delinquent he is incarcerated in the Patuxent Institution without maximum or minimum limitations on his sentence. The trial in accordance with the existing practices of Maryland is based

upon extensive hearsay in both the records of the Institution and the testimony of its staff psychiatrist. This includes substantial hearsay as to the alleged background of the inmate.

The writings of the Director of Patuxent reflect various views regarding his institution. In an article, "The Maryland Defective Delinquency Law" (J.A. 4, 501 through 503), the author indicates that the Institution must rely quite heavily on case history criteria and on clinical impressions which are not easily defended as objective standardized measures. The author further recognized that as the statute is written, a disproportionately large percentage of the criminal population may be referred for examination which the author feels is most unwise. They additionally recognize that they are primarily experimenting in a new field in which there is no wide background or experience or generally accepted criteria and that the Institution, in essence, operates under a trial and error method. The Institution is described by its learned Director as a maximum security institution with barred windows, barred doors, around-the-clock surveillance and a strict regard for discipline. Inmates are disciplined if they do not attend "therapy" and the authors opine at the conclusion of their article that the Patuxent Institution is moving into a region of psychiatry which has not been thoroughly explored.

In a later article, "Methods and Experience in Group Treatment of Defective Delinquents in Maryland" (J.A. 4, 503 through 505), the author recognizes, interestingly enough, that deprivation of liberty without an effort at rehabilitation is, in his judgment, unconstitutional. It is further observed that the staff at Patuxent is very limited and that the therapy of the psychiatrist constitutes only a fraction of his working day. The author further states that economy of staff time has made group therapy the treatment of choice at Patuxent and that the professional therapists are at liberty to choose only persons with whom they felt they could work best. The authors also indicate that

the activity group therapy which was most beneficial to certain individuals who could not profit from verbal interaction was discontinued when the worker took a job elsewhere (compare J.A. 4, 443).

Later, the distinguished Director of Patuxent further defines the Institution's role: "The Maryland Defective Delinquent Law; An Eight-Year Follow-Up" (J.A. 4, 506 through 509. The Director writes that psychotics who are committed under the defective delinquent definition have been and are presenting management problems during their deranged periods. He further advises that Court testimony is the major and most time-consuming part of the Institution's activities. He feels that the Defective Delinquent System is too complex for a jury and that treatment, according to him, is only given where appropriate and would be decided by himself.

An inspection of the Patuxent Institution by the American Psychiatric Association Committee headed by Dr. Philip Roche, in a report dated September 20, 1960 (J.A. 4, 491 through 499), indicates in parts pertinent that it is bad medical practice for the evaluating doctor to testify against his inmate patient, which is the practice at Patuxent. The American Psychiatric Association also reported the view of the then Director of Research, Dr. James E. Smith, that with one hundred and twenty (120) to one hundred and thirty (130) men in a treatment program, the Institution would need at least seven (7) full-time doctors for adequate treatment. The report further indicates that the school program had insufficient instructors but that the entire procedure was apparently a trial period for a great social experiment. It is perhaps interesting in comparing the Report of the American Psychiatric Association, with the views of the learned Director, that a private psychiatrist would not be competent to treat inmates in Patuxent Institution considering the general aims of the Institution (J.A. Md. 765).

Inmates are moved in Patuxent according to a tier system, a theoretical reward according to the practice of

Patuxent. However, in fact, according to the original trial transcript in the matter of Daniels, the staff psychologist testified that Daniels was placed on the release tier because of space and administrative problems only, not because he had recovered and that his removal from that tier was strongly motivated by his repulsing a homosexual attack from another inmate (J.A. 4, 443-444). One of the major problems, according to the Institution, is the fact that private psychiatrists do not understand its functioning (J.A. Md. 765) and that the custodial staff has not received any training and is no different from the guards at the penitentiary and that individual interpretations are a matter of great concern (J.A. Md. 4, 204, 205, 256).

The testimony of the original research director, Dr. Smith, reported in the findings of the American Psychiatric Association, that seven (7) full-time doctors would be needed to treat one hundred and twenty (120) individuals (J.A. Md. 770) is apparently correct and accurate based upon sound standards as indicated by the State's witnesses in like institutions in foreign nations (J.A. Md. 674 through 679). The record, however, in this cause indicates that in an overall view the majority of full-time psychiatrists at the Patuxent Institution are only filling half the professional staff (J.A. Md. 781-782). Additionally, the time charts of the Patuxent Institution which seem to bear out the testimony of the witnesses hereinafter set forth, show that treatment is only given half of the time when scheduled. There appears to be only time for fifteen (15) minutes per week per patient based on the statistical chart (J.A. Md. 95-96). Of course, when one considers the extensive problems encountered by curtailed therapeutic space (J.A. Md. 783-784), it would appear unreal that the definition of a defective delinquent is "curtailed" depending on economics of space (J.A. Md. 784).

In addition to the views of the American Psychiatric Association that the Patuxent psychiatrist creates an image of prosecutor rather than of physician, several of the witnesses in the Maryland trials testified to the adverse and,

indeed, cataclysmic effect when doctors are required to testify against their patients and then still attempt to treat them, notwithstanding the fact that there is additional confusion and difficulty when they are constantly changing therapists, such as at Patuxent (J.A. Md. 136, 138, 240, 241, 673, 674, and compare 135, 392). According to the better psychiatric view, in order for a psychiatrist to properly treat a patient, it is necessary that there be mutual respect and trust (J.A. Md. 84 through 87). This, however, was not the case in the matter of Daniels, as his doctor was grossly discouraged (J.A. Md. 95) and when there was a loss of continuity, the result was considered devastating (J.A. Md. 87).

Of the several physicians who testified at the Maryland trials, there was no real difference in meaning between the recidivist criminal and the defective delinquent (J.A. Md. 90, 138, 160 through 171, 177, 181, 182, 216, 217, 352 and 353, 398, 399, 468, 541, 542, 700, 709). Patuxent, in essence, was described as a prison run by a medically-educated director rather than a prison-educated director (J.A. Md. 93, 132, 356, 357, 358, 468, 469). Parenthetically, it might be noted that in the testimony of the Commissioner of Corrections was the view that seventy-five percent (75%) of the inmates in the State Prison System have previous criminal records (J.A. Md. 514); however, after a second time through the State Prison System three (3) out of four (4) of these inmates do not return (J.A. Md. 520 through 521).

Further trial testimony noted (J.A. Md. 700 and J.A. 4, 539) that eighty to ninety percent (80%-90%) of the inmates of the state penitentiary are sociopaths, *i.e.*, psychopaths who fit the definition of a defective delinquent. In the troublesome area of the definition of the defective delinquent, many experts found substantial difficulty because the definition itself was vague and unclear even to psychiatrists (J.A. Md. 273, 68, 69, 93, 94, 138, 258, 314, 347, 348, 400, 401, 776, 777); the learned Director opined that the act differs in different counties of the State of

Maryland because of seemingly different standards (J.A. Md. 772, 773), and he feels further that juries do not fully accept or appreciate their responsibility under the Defective Delinquent Law (J.A. Md. 773, 774). The Patuxent definition was described as general in its terms and is easily made to apply to any circumstances, perhaps even a civil rights demonstration (J.A. Md. 174, 175, 273, 349, 350, 463, 464). Indeed, many prominent experts felt that because psychiatric diagnostic skills are not certain (J.A. Md. 176, 177, 350, 351) that doctors should not be, as they presently are, the ultimate appliers of the law (J.A. Md. 175, 176). The present definition leads only to a "fairly accurate discrimination" so that Patuxent is, in essence, an experiment. (J.A. Md. 197, 198, 242). Unfortunately, the fifty-odd prisoners receiving no treatment for two (2) years (J.A. 4, 518) are unlucky, or are they?

The psychiatric profession does not seem to agree as to what a psychopath is (J.A. Md. 194, 234, 235, 238, 247 through 251, 314); although this is a problem, it would appear to be magnified by differences within the staff at Patuxent and apparently it is further magnified because jurors are required to understand these definitions within a short period of time (Ex. 12, p. 33). Indeed, the psychiatrists themselves all seem to differ as to the meaning of the terms of the statute and their quantitative and qualitative effects (J.A. Md. 122, 130, 131, 134, 165, 166, 194, 195, 198, 200, 250, 251, 698, 699 and then compare with 129 through 127, 130 through 131, 139 through 140, 162 through 163, 193 through 194). These experts seem to realize that the statute does not have any objective measurements (J.A. Md. 90, 91, 130 through 132, 141 through 142, 162 through 164, 388, 389, 799).

All the physicians were in agreement that in order to apply the statute, a good, accurate history was needed (J.A. Md. 131, 135, 173). In the case of *Daniels*, the hearsay history was found to be patently inaccurate, as shown by the testimony of the mother of the child who was allegedly sexually assaulted by this young Negro (J.A. Md. 61, 62,

63; compare with J.A. 4, 403). It would appear then, that past histories which are utilized by the Patuxent Institution are the rankest form of hearsay and are demonstrably inaccurate. The record is abundant that Daniels has not received any effective treatment (J.A. Md. 70, 75, 76, 264, 265, 353, 354, 359), as well as indicating that all who were concerned with him did not find him to be a danger to society or persons (J.A. Md. 69, 178, 353, 354). Inmate Murel's transcript (Ex. 11, p. 52) indicates that except for an assault when he was a fourteen-year (14) old boy, he had committed no offenses against humans, but only offenses against property. In addition, he had been at the Institution almost as long as anyone, but was receiving no treatment whatsoever (Ex. 11, p. 39). He is unfortunately in Patuxent with apparently no mental disorder because he was classified as a psychopath, a finding that the Maryland Court of Appeals says no longer exists.[1] Inmate Murel's redetermination hearing (Ex. 10) on November 30, 1962, took place in a period of approximately thirty (30) or forty (40) minutes, with the Court opining at the conclusion of the eighteen (18) page transcript that for the "boy's own good" we'll find him a defective delinquent (Ex. 10, p. 19). This is to be contrasted with the treatment that he has not received through the many years of his confinement. The trial Court made absolutely no findings as to the requisite statute and the whole State's case, as a matter of fact, was merely the reading of the interview note and report. Indeed, if this was a trial, then it was one in form and not in substance.

As to inmate Tippett, while he is no longer a party to this appeal, having miraculously been released, his trial and the facts of his case present additional evidence of the shocking abuses of the Patuxent one-man power. The offense of Mr. Tippett is that he "stutters" (Ex. 14, p. 31).

---

[1] *Director v. Daniels*, 243 Md. 16, 221 A. 2 397 (Md. 1966), and see Ex. 9, p. 45.

Other than that, he seems to be a reasonable and normal sort of person, notwithstanding the fact that he had been at Patuxent since its inception. His first hearing was in 1957, and during that hearing when the learned Doctor Boslow was asked whether or not Patuxent would be able to give Mr. Tippett treatment, stated that this was "beside the point" (Ex. 12, p. 24). The charge to the jury is most enlightening and covers nothing. The Court merely gave the jury a copy of the statutes and sent them to the jury room to deliberate (Ex. 12, p. 32). Predictably, they returned in ten (10) minutes. In 1957, when inmate Tippett was again brought before the Circuit Court for Prince George's County, he was represented by one Richard E. Painter (Ex. 12, p. 1). In the trial in 1959 (Ex. 13), Mr. Tippett, while at the penitentiary, became a defective delinquent and was returned to Patuxent and again found a defective delinquent. In 1963 (Ex. 14, p. 1), inmate Tippett again returned to the Circuit Court, this time to be prosecuted by his former attorney, Richard E. Painter, and the record in the 1963 hearing shows that after eight (8) years in Patuxent he had advanced to the Training Program and lofty title of "tier sanitarian" (Ex. 14, p. 10). It is respectfully suggested to the Supreme Court of the United States that this should read "tear," as we think it nothing more than a crying shame that any individual after ten (10) years, whose major offense is stuttering, and whose former lawyer is now his prosecutor, should be subject to such indignities. It is noted that notwithstanding the comments of the Patuxent Institution in the earlier hearing that inmate Tippett was of low intelligence and had a great deal of difficulty with speech, he was later placed in a class for shop mathematicians. Interestingly enough, in the 1963 hearing it was indicated that inmate Tippett now had organic brain damage, but this had no significance since people with organic brain damage were not supposed to be at Patuxent. The Institution further stated in the 1963 hearing, "he stutters so badly that one can hardly understand him on many occasions. On such times he goes into spasmodic jerking movements of his arms and legs." It was found that

Mr. Tippett was not a bright therapeutic prospect and then the Institution finally admitted to the Court that after ten (10) years no speech therapist had ever been provided for him (Ex. 14, p. 25, p. 87). This notwithstanding the fact that inmate Tippett had never been given vocational training. In 1966 it was decided that with a new lawyer and a different prosecutor, and his own psychiatrist testifying as a witness against him, that inmate Tippett should continue to be a defective delinquent because his basic problem is drinking (Ex. 15, p. 27). Concluding the eloquent defense of inmate Tippett was the jury argument of his counsel, which, if repeated by the members of this Honorable Court in their deliberation would take no more than ten (10) seconds (Ex. 15, p. 40).

Inmate Avey was convicted in Prince George's County of assault with intent to murder and after having been made a party to the original Daniel's matter was sent to Patuxent Institute to determine whether or not he was a defective delinquent. On the advice of his counsel (who is counsel in this matter), inmate Avey, at that time, took the position that he had a Fifth Amendment right against self-incrimination. Accordingly, inmate Avey was destined to remain at Patuxent since this was upheld by the United States District Court. Parenthetically, counsel would note, although it is not a matter of record, that after the decision in the United States District Court inmate Avey did, in fact, speak with the psychiatrist at the Institution and has now been denominated as a "defective delinquent."

At the redetermination hearing of inmate Creswell held in 1966, it appeared that inmate Creswell had seen his psychiatrist seven (7) times since his commitment in 1958 (Ex. 9, p. 44). Ostensibly, the Institution took the position that the inmate was "uncooperative." In addition, it should be noted that in the charge to the jury in the trials of inmates Creswell and Tippett, the Trial Court apparently spoke as an advocate of the Attorney General's Office in praising the Institution (Ex. 13, p. 41; Ex. 9, p. 160), rather than in defining terms. Indeed, in the hearing as to inmate Murel,

the Court threatened the jury in its "charge" that if he was not found a defective delinquent, Petitioner Murel would be released "without strings, probation or anything like that." (Ex. 11, p. 70). The Court in the second Tippett redetermination charged the jury that the burden of proof was on inmate Tippett (Ex. 13, p. 40), whereas in Creswell (Ex. 9, p. 169) and Murel (Ex. 11, p. 70), the Court took the position that the burden of proof was on the State.

As previously noted, the custodial staff at Patuxent Institution, with whom the inmate has his major contact, has no training different than that of the regular prison guards (J.A. Md. 256).

The experts who testified at trial were in almost total agreement that the law is subject to the Director's interpretation and that if an improper person were the Director, it would be a dangerous situation (J.A. Md. 267; then compare 348, 349, 707, 708, 775).

In comparison, the laws of the other states (J.A. 4, 489-490), which allow for indeterminate sentences, provide for acts designed to control sexual psychopaths. That in these other states the qualifications of the psychiatrist are fairly rigid (J.A. 4, 489-490), and that in these other states for the most part the laws are inoperative (J.A. 4, 490). It is well spoken that long ago the American Psychiatric Association's Report (J.A. 4, 498) opined "Patuxent has not succeeded as a scientific research institution intended in the design of its founders."

Recognizing the emphasis placed on the psychologist as well as the psychiatrist, that profession, according to the witnesses, has not reached the state where it can predict individual human behavior with reasonable degrees of certainty (J.A. Md. 534). While they can predict group behavior, individual behavior is extremely difficult to predict and that, in the view of the well recognized prison psychologist, Dr. George Lassen, the Defective Delinquent Act is nothing more than simple punishment (J.A. Md. 535, 536). The term "emotional imbalance," one of the major factors of the definition, is a term which can mean whatever you

want it to mean, depending upon who the tester is (J.A. Md. 539).

Of the testimony of some of the inmates at the original Maryland trials, it is noted that inmate Powers had been at Patuxent for nine (9) years with no treatment (J.A. Md. 553). Inmate Bressler, whose family wanted him treated by his own private psychiatrist, was denied the right to have a private psychiatrist treat him (J.A. Md. 556, 557). Inmate Tippett, as previously pointed out, has a noticeable speech defect but no speech therapy is available (J.A. Md. 588, 589). Inmate Murel, who at the time of the original Daniels' trial had been in seclusion for nine (9) months, was getting his medication from other prisoners (J.A. Md. 592, 593). Inmate Hawkins was at Patuxent for two (2) years with no treatment, although his therapy was started the day before he was scheduled to testify (J.A. Md. 597). Inmate Mosdale had been at the Institute since 1960, and at the time of the Maryland trials had no therapy (J.A. Md. 599), and inmate McDonough had been at the Institution over five (5) years because he is considered uncooperative because of his reliance upon the Fifth Amendment (J.A. Md. 602).[2] Significant was the testimony of guard Allen Levi (J.A. Md. 471-490), who corroborated the fact that the guards have no training and are no different from the guards at the House of Corrections or penitentiary, that their selection process is no different and that only one third (1/3) of the committed population was in therapy in August of 1964 (J.A. 4, 518-530).

Treatment at Patuxent is mostly milieu therapy which, in fact, cannot exist because the major contact of the inmates is with the guards (J.A. Md. 204) and all are agreed that the guards do not have any training whatsoever in psychology, psychiatry or other beneficent prison routines (J.A. Md. 240, 205, 256). Patuxent Institution, which could represent an enlightened approach to penology is, in fact, a hoax. Its release tier is a hoax and housekeeping

[2]See McDonough v. Director, 229 Md. 626, 183 A. 2 368 (1962).

procedure (J.A. 4, 441-445); the staff does not agree on the definition (J.A. 4, 484); the American Psychiatric Association says it is woefully under-staffed (J.A. 4, 491-499); there is no doctor-patient relationship (J.A. 4, 491-499); the Director says the definition is vague and indefinite; he says therapy is a punishment program; he says the staff is too limited to do the real job; he says the doctors work with whom they like, not those who need help (J.A. 4, 503, 506). Therapy is limited and haphazard (J.A. 4, 518, 525). Over one-third (1/3rd) of the inmate population receives little or no therapy and, believe it or not, one inmate was getting Social Security payments because he was psychotic (J.A. 4, 538).

The story, then, of Patuxent is a story of human tragedy. It is a story of an institution all dressed up in evasive, glittering language with no guides, controls or sense of direction, whose vagaries have resulted in untold numbers of individuals being incarcerated for extended periods of time with little hope of treatment[3] or hope of release.

SUMMARY OF ARGUMENT

A defective delinquent is defined under the Maryland Defective Delinquent Act as:

> "An individual who by the demonstration of persistent, aggravated, anti-social or criminal behavior evidences a propensity towards criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so far as to require such confinement and treatment when appropriate as may make it reasonably safe for society to terminate the confinement and treatment." (Article 31b, Sec. 5, Annotated Code of Maryland).

---

[3]The treatment of inmates Murel and Creswell, when they most needed help was to place them naked in "meditation" cells without mattress, pad or blanket (J.A. 4, 558). This is commonly referred to as "sensory deprivation"; we prefer to call it "barbarism" (Ex. 9, p. 84).

This definition of a defective delinquent as construed by the Court of Appeals of Maryland is vague due to its uncertainty as to scope and applicability. This definition is defective in that it permits a judge or jury to punish, or withhold punishment, in their uncontrolled discretion. It fails to provide notification to potential defendants of its scope and of its reach.

Under this vague definition, a defective delinquent in Maryland is deprived of his liberty upon a preponderance of the evidence during a judicial procedure which allows the introduction of hearsay evidence of past anti-social conduct extending as far in the past as such information can be obtained. The remainder of the evidence presented by the State is almost exclusively that of State psychiatrists who testify on the basis of these unsworn reports as to the defendant's past, his propensity towards criminal activity or anti-social behavior and his tendencies toward emotional unbalance, and his actual danger to society. In this setting, evidence of treatment or its lack thereof is not admissible in the defective delinquent adjudication. It is interesting to note that though the defective delinquent has not himself raised the issue of his mental status, yet he is thrust against a wall of *ex parte* evidence surrounding the ultimate issue for adjudication. In this setting, the defective delinquent's opportunity to summon witnesses for years past is nil, thereby effectively depriving him of the right of confrontation, and since his failure to speak may be commented upon, this procedure effectively denies him the rights against self-incrimination, as well.

The majority of the decisions of the Maryland Courts, which have considered the Constitutionality of the Defective Delinquent Act, have resolved themselves into a rather simple thesis; the Act is civil in nature, its theory is therapeutic. Under this guise of the civil label, basic and elementary conventional procedural safeguards have been discarded. It is interesting to note that the defective delinquent is involved in this procedure because he has violated the criminal law, and yet, he loses his right to a speedy trial, his right under

the Constitution of Maryland to have the jury judge the law as well as the facts, his right to confront witnesses. his right to bail, and other rights guaranteed to those who are caught up in the web of the criminal justice system. And it is in this setting that the Maryland Courts have held that there is no requirement that treatment be given to one who is committed as a defective delinquent. The lack of treatment itself is virtually criminal in nature and would cry out for the elimination of the tyranny of labels which has deprived the defective delinquent of so many basic human rights. There must be some rational basis for segregating the supposed defective delinquent from the correctional population and turning his commitment from a fixed time to an undeterminate one. When treatment is not mandatory, that basis does not exist.

In this maze of labels and one-sided procedures, it matters not whether the defective delinquent's initial criminal prerequisite was a crime which was an actual danger to persons as opposed to an offense against property. The interpretation that the defective delinquent statute applies to crimes oriented against property has received approval by the Court of Appeals in Maryland. This clearly violates the Eighth Amendment's ban against cruel and unusual punishment in that one is committed to Patuxent for an indeterminate period of time and may remain at Patuxent long after his original criminal sentence would have expired. Again in this setting, civil labels and good intentions do not obviate the need for due process safeguards.

The entire investigatory procedures within the walls of the Patuxent Institution which form a preliminary to the actual Court adjudication, are completely devoid of any basic human, no less Constitutional, safeguards. The accused defective delinquent goes through a series of examinations and appears before a series of Boards without the aid of Counsel and, in fact, without any legal representation of any type or nature. This lack of due process permeates the fact-finding processes, and the adjudicative process, all of

which are critical stages on the road to defective delinquency determination.

The question then resolves itself as to whether this Court will pierce this tyranny of labels which is attached and face the realities of the situation.[4] Whether the Act is civil or criminal, whether the Act provides proper standards; whether, in fact, inmates receive treatment are matters to be determined by the realistic evidence and realistic thought and not by an artificial dichotomy of variable terms. Due process is required when the result of a judicial act is incarceration. It is the Petitioner's contention that there is no question but that they are incarcerated by a procedure which has made no room for Constitutional safeguards and guarantees and which has been, since its inception, like a chameleon changing colors depending upon the situation so as to blend into the desired result.

---

[4]Interestingly enough, within the past months, the distinguished director of Patuxent, when defending his institution from a *nisi prius* decision (Circuit Court for Montgomery County, Maryland, Misc. Petition, No. 4363, *et al.*, November 18, 1971), was quoted thereby: "Boslow said yesterday that he believed Patuxent was a success." "A lot of other world experts, including [psychiatrist] Karl Menninger and [Chief Justice] Warren Burger say it is," he said; *Washington Post*, November 20, 1971. Diligent research shows, at least on the face of the record, that Dr. Menninger visited *with* Dr. Boslow *three* years before the Maryland trials for an afternoon (J.A. Md. 306) and nowhere in the reported cases can counsel find an expression of views by the learned Chief Justice. Certainly, an *ex parte* determination of "success" would be highly questionable by anyone. In addition, Dr. Menninger took pains to point out that the Boslowism of "emotionally unstable personality" is a meaningless expression (J.A. Md. 314).

ARGUMENT

I.

WHETHER THE MARYLAND DEFECTIVE DELINQUENT STATUTE IS UNCONSTITUTIONALLY VAGUE.

Procedural rights and basic constitutional liberties are accorded a generous interpretation in their favor. *Heflin v. United States*, 358 U.S. 415 (1959). It matters not whether the incarceration is based upon the label of civil or criminal; in *Re Oliver*, 333 U.S. 257 (1948). The United States Court of Appeals for the Second Circuit in the *United States, ex rel. Mignozzi v. Day*, 51 F.2d 1019 (2nd Cir. 1931), a deportation case, instructs one at page 1021, "these are consequences whose warrant we may properly scrutinize with some jealousy and insist that logic may not take the place of understanding." In a more recent case, *Costello v. Immigration and Naturalization Service*, 376 U.S. 120 (1964), and the Petitioners respectfully urge to this Honorable Court that there is little difference between deportation and the life "sentence" given at Patuxent, Justice Potter Stewart advised us at page 128:

> ". . . in this area of law involving as it may the equivalent of banishment or exile we do well to eschew technicalities and fictions and to deal instead with reality."

Reid v. Covert, 354 U.S. 1 (1957), has a teaching from *Boyd v. United States*, 116 U.S. 616 (1886), that is well to keep in mind when one examines Patuxent Institute:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form, but illegitimate and unconstitutional practices get their first footing in that way, mainly by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that Constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their effi-

> cacy and leads to gradual depreciation of the right as if it consisted more in sound than in substance. It is the duty of Courts to be watchful for any constitutional rights of the citizen and against any stealthy encroachments thereon.".

A defective delinquent is defined by the Act, Section 5, Article 31(b), Annotated Code of Maryland, as "an individual who by the demonstration of persistent, aggravated, antisocial or criminal behavior, evidences a propensity toward criminal activity and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment when appropriate as may make it reasonably safe for society to terminate the confinement and treatment."[5] We are first guided with the rule that "Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the Act or in regard to the applicable test to ascertain guilt." *Winters v. New York*, 333 U.S. 507 (1948).

In applying the test to a state statute, the statute itself, as construed by the state's highest court, is considered, and not necessarily the accusations under the statute. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). Accordingly, if the statute is lacking in terms susceptible of objective measurement, it is unconstitutionally vague. *Baggett v. Bullitt*, 377 U.S. 360 (1964). Maryland's definition of a defective delinquent as construed by the Court of Appeals of Maryland is vague due to its uncertainty as to its scope and applicability. The definition is circular and rests ultimately on the basis of past antisocial behavior or propensity toward criminal conduct to establish a propensity tofuture antisocial behavior or criminal conduct, The Act, Section 5. *Camparella v. State*, Md. 355, 135 A.2d 311 (1957). In *Palmer v. State*, 215

---

[5] All are eligible, see *The Act*, Sec. 6(a) Appendix A, page 7a and Art. 27, Section 690 Annotated Code of Maryland.

Md. 142, 137 A.2d 119, the Court of Appeals of Maryland said that the Act applied to psychopaths. Following the attack in the Fourth Circuit in the opinion in *Sas v. Maryland*, 334 F.2d 506 (4th Cir. 1964), and the opinion of the trial Court in *Avey Daniels*, the Maryland Court of Appeals in *Director v. Daniels*, 243 Md. 16, 221 A.2d 397 (Md. 1966), tells us that one no longer need be a psychopath and, in fact, that it's defining a defective delinquent as a psychopath was apparently erroneous. No definition of deficiency or unbalance as construed under the Maryland law stands without necessary reference to antecedent conduct, the quantum and quality of which is undeterminable by men of common intelligence. Recourse to expert medical testimony as to the ultimate issue in an area where admittedly medical science has not developed to a station of reasonable certainty cannot save the definition. General scientific acceptance is lacking by the experts. See *Fleuti v. Rosenberg*, 302 F.2d 652 (9th Cir. 1962), where psychopathic personality was found to be unconstitutionally vague as applied to a homosexual. It is respectfully urged that where doctors disagree (J.A. Md. 274) the law cannot delegate to them the delicate task of testifying to and of almost necessity determining the ultimate issue in a proceeding which leads to indeterminate confinement without maximum or minimum limits. Unlike habitual offender laws, the antecedent conduct required to brand a man a defective delinquent and incarcerate him for life need not necessarily be criminal convictions. In this respect, the Maryland definition is even broader than that of the New Jersey gangster statute struck down in *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

This Court in *Minnesota ex rel. Pearson v. Probate Court*, 209 U.S. 270 (1940), had before it a state statute providing for the civil commitment of persons with "psychopathic personality." The statute as construed and *limited* by the Minnesota Court was upheld by this Honorable Court on a finding that a person had shown a "habitual course of misconduct in sexual matters" and "an utter lack of power to control their sexual impulses" and hence was "likely to attack or otherwise inflict injury, loss or pain or other evil

on the objects of their uncontrolled and uncontrollable desire." This Honorable Court upheld this statute as construed and limited but indicated that the express language of the definition without more would have rendered the statute of doubtful validity. The questionable language defined "psychopathic personality" as follows:

> ". . . the existence in any person of such conditions and emotional instability or impulsiveness of behavior or lack of customary standards of good judgment or failure to appreciate the consequences of his acts or a combination of any such conditions as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons." *Id.* at 272.

It is noted, of course, that under the Minnesota statute, the physicians were licensed, their standards of judging a sexual psychopath were different and the psychopath could petition for release at any time.

It is the Petitioners' position that any law which experiments with liberty and which can be applied with standards so loose that the Governor's Commission (J.A. 4, 509) and the American Psychiatric Association (J.A. 4, 491) find error, then this type of law is in a legal sense arbitrary and capricious, for due process as a basic fundamental of ordered liberty requires that a law not be unreasonable, arbitrary or capricious and that the means selected shall have a reasonable and substantial relation to the objects sought to be obtained. *Heflin v. United States, supra.*

The Supreme Court of Oregon in the matter of *State v. Hodges,* .457 P.2d 491, had before it a statute somewhat similar to the Maryland Defective Delinquent statute, although it was admittedly a "criminal" statute and provided for child delinquency. The statute stated:

> ". . . when a child is a delinquent child as defined by statute of this State, any person responsible for or any act encouraging, causing or contributing to the delinquency of such child, or any person who by threats, command and persuasion endeavors to

> induce any child to perform any act or follow any course of conduct which would cause it to become a delinquent child, or any person who does any act which manifestly tends to cause any child to become a delinquent child shall be punished upon conviction by a fine of not more than One Thousand Dollars ($1,000.00) or by imprisonment in a County jail for a period not exceeding one (1) year, or both . . ."

Oh, how true are the words of the Supreme Court of Oregon when it stated:

> "A law that permits a Judge or Jury to punish or withhold punishment in their uncontrolled discretion is defective as much for its uncertainty for adjudication as it is for its failure to notify the potential defendants of its scope and reach." *State v. Hodges, supra,* at 494.

As set forth in the Statement of the Case, the experts and their views, including the views of the distinguished Director of Patuxent, are such that men of ordinary intelligence cannot understand, grasp or appreciate the scope of the definition of a defective delinquent. This definition has not been saved by any controlling language by the Maryland Court of Appeals, but, in fact, the definition has been obscured by the Maryland Court of Appeals' attempts to vacate its findings in the *Palmer* case, *supra,* that the statute was meant to apply to a psychopath. This definition becomes all the more grave when the Court of Appeals of Maryland has already opined that it is not necessary that an inmate at Patuxent be given treatment. *Shields v. Director,* 244 Md. 710, 224 A.2d 107 (1966). It is the contention of the Petitioners that the definition of a defective delinquent is constitutionally sick. Is it not shocking that administratively the law is not to be followed, and presumptively the definition ignored, when economy so dictates (J.A. 4, 510)?

II.

THE PROCEDURES EMBODIED IN THE STATUTE AND IN THE TRIAL ARE APPLIED IN SUCH A MANNER AS TO OFFEND THE DUE PROCESS REQUIREMENTS OF THE FIFTH AMENDMENT AND THE CONFRONTATION REQUIREMENTS OF THE SIXTH AMENDMENT.

A defective delinquent in Maryland is deprived of his liberty upon a preponderance of evidence under a vague and novel definition. The act is understood to require the introduction of hearsay evidence of past antisocial conduct extending as far in the past as the same can be obtained. The evidence presented by the State is almost exclusively that of State psychiatrists who testify on the basis of unsworn reports as to the defective delinquent's past, his persistent and aggravated antisocial or criminal behavior, his propensity towards criminal activity or antisocial behavior, his tendency towards unbalance and his actual danger to society. The testimony of the medical witnesses is the State's case,[6] and is of necessity given weight by the courts and juries. The witness is an expert and a physician theoretically dedicated to healing the ills of mankind. Evidence of treatment, or its lack thereof, is not admissible as shown by the trial transcript in the Circuit Court for Prince George's County (J.A. 4 at 396 to 461, and see *Shields v. Director, supra.*

Anything the defective delinquent says or fails to say to the State psychiatrist or his own psychiatrist whether during examination or treatment may be used against him. See *McDonough v. Director*, 229 Md. 626, 183 A.2d 368 (1962). His failure to call his own psychiatrist may be commented upon. *Hoverter v. Director*, 231 Md. 608, 188 A.2d 296 (1963). The defective delinquent has not himself raised the issue of his mental status. *Lynch v. Overholser*, 396 U.S. 705, (1962). In essence, in a defective delinquent proceeding, counsel for the defendant is powerless against

[6]See as examples, Ex. 11, p. 6; Ex. 10, p. 6.

a sea of incompetent, rambling and remote evidence and a wall of *ex parte* evidence surrounding the ultimate issue. The act as construed and implied effectively shifts the burden of proof to the defective delinquent, who, in confinement, has the least opportunity to carry his burden.[7] He can do no leg work, his requests for information do not bear the imprimatur of officialdom, he is without funds to hire private investigators, while the State has its police machinery and that of its political subdivisions to call upon.

In this setting, the defective delinquent's opportunity to summon witnesses of years past and distances away is a hollow one. So the Petitioner's right to an independent psychiatrist is hollow, for he, as a practical matter, can do little more than base his opinion on his examination of the defective delinquent and and the extensive data compiled by the State with its limitless resources. Given the same background data as that available to the State, the opinion of the "independent" psychiatrist is but feedback of the institutional determination. His report has gone to the court for use by either side.

Under these circumstances the silence of the suspected defective delinquent in court is as damaging as silence in the Institution.[8] The proceedings have a direct tendency to require the defective delinquent, a convict, to take the stand to testify about his past conduct, including criminal and antisocial behavior.

As shown, a person suspected of defective delinquency is denied a hearing as to whether he will be aided by treatment and whether any treatment is available to him.[9]

---

[7] See Ex. 13, p. 40.

[8] See *McDonough v. Director*, 229 Md. 626, 183 A.2d 368 (1962), where the Director's testimony characterized the defective delinquent as "hostile" by reason of his attempt to assert the privilege against self-incrimination. *Cf. Hoverter v. Director*, 231 Md. 608, 188 A.2d 696 (1963).

[9] *Parks v. State*, 224 Md. 643, 166 A.2d 917 (1961); *Queen v. Director*, 226 Md. 664, 174 A.2d 351 (1961); *Shields v. Director*, *supra*.

After confinement without maximum or minimum limits is imposed, the Institution administratively determines *ex parte* whether treatment is "appropriate."[10] In view of the far reaching and possibly devastating nature of the commitment, a determination as to treatment is constitutionally required. Even assuming the constitutionality of the indeterminate confinement of untreatable defective delinquents under the act, a defective delinquent who is treatable cannot obtain a determination as to that status. Thus there is no preliminary judicial determination of the very basis upon which the State asserts its power to so seriously restrict liberty. A hearing on this question is even more necessary where the State is admittedly acting in a novel and experimental area of penology.

In *Skinner v. Oklahoma*, 316 U.S. 535 (1942), Chief Juctice Stone, in a concurring opinion, stated that the state could not sterilize habitual criminals merely upon a showing of the requisite prior offenses and a finding that sterilization would not adversely affect the criminal's health. Observing that common knowledge, experience and medical science did not establish a necessary relationship between habitual criminality and heredity, Chief Justice Stone concluded that the state could not sterilize without affording the offender an opportunity to challenge his possession of an inheritable criminal tendency, the only fact that could justify sterilization.

To argue that Maryland can confine indeterminately a treatable defective delinquent without a preliminary finding as to that fact and the availability of treatment to him, is to frankly admit that the State is imprisoning defective delinquents, possibly for life, and at the same time depriving

---

[10]It should be noted that the Act's definition of a defective delinquent, before its amendment in 1957, required "confinement and treatment under an indeterminate sentence" until it was "safe for society to terminate the confinement and treatment." Laws of Maryland 1951, Ch. 476.

them of self-help and those treatment resources otherwise available in society.[11]

Skinner, supra, discusses an irreparable invasion and injury to the person. Commitment under the act, without maximum or minimum limits, is capable of subtle, far reaching and devastating injury to the mind and spirit, which cannot be repaired by any post-commitment legal proceeding.

The concurring opinion of Justice Jackson in *Skinner v. Oklahoma, supra,* at page 546, is relevant to the question of fairness. The majority of the court struck down the statute on the basis of equal protection since felons convicted of embezzlement were excluded from the statute. Justice Jackson agreed with the majority and Justice Stone's concurrence, but noted that if a careful hearing were present, the statute might not fail on equal protection grounds, taking the position that a broad assertion of state power in a novel area of penology *could possibly* be saved by *meticulous procedural safeguards.*

It is submitted that the State cannot constitutionally confine criminals suspected of defective delinquency, possibly for life, without affording them *at least* a hearing on *all* material issues with *all* safeguards and protection which the State affords those charged with crimes. See *Baxstrom v. Harold,* 383 U.S. 107 (1966). This argument does not rest upon the question of which particular safeguards of the Federal Constitution are binding upon the State in the

---

[11] This argument does not necessarily contemplate the abuse or inaction on the part of institution authorities. For reasons beyond the control of the defective delinquent and the authorities, treatment may not be available. Institutional treatment is dictated by factors such as population, appropriations, facilities, personnel and the welfare of the majority of the Patuxent population. Furthermore, serious doubts exist as to the effectiveness of treatment in general. See Lindman and McIntyre, *The Mentally Disabled and the Law;* Cleckley's Chapter on "Psychopathic States" in Arieti, *American Handbook of Psychiatry,* 585.

defective delinquency determination and redetermination. Here it is contended that, in its totality, the determination proceeding in which the State applies the definition of defective delinquency as construed by the Court of Appeals of Maryland, constitutes a denial under the due process clause and the equal protection clause of the Fourteenth Amendment.

It seems unrealistic that the Director in his article, "*The Maryland Defective Delinquency Law*" (J.A. 4, 501), would state:

> "In the final analysis, we must rely quite heavily on case history criteria and on clinical impressions regarding the individual. Such impressions are not always as reasonably defended in Court as objective, standardized measures and it is hoped that such measures will be derived in the future."

Accordingly, the Director, himself, indicates that he must have substantial hearsay and that the individual must of necessity convict himself for, if he doesn't speak, as in *McDonough, supra*, he is recalcitrant and shall remain forever, and if he does speak, then he subjects himself to a lifetime of Patuxent's perhaps milieu therapy. Where the Director himself admits that his impressions are not easy to defend as objective standardized measures, and prays for guidance in the future, we are faced with the simple salient fact that under the law as written now, the act cannot be applied in an objective standard way and the individual can only hope that there will be some psychiatric breakthrough in the future which will cause his keepers to review their thinking. Again, in the article referred to, the author states that the basic difference between the sexual psychopathic statutes which have been upheld and the Maryland statute is that in the Maryland statute there is no wide background of experience or generally accepted criteria which have been tested and upheld such as in the Sexual Psychopathic Standards spoken of in the case of *Minneapolis ex rel. Pearson v. Probate Court, supra* (J.A. Md. 502). The learned Director closes his article with the interesting statement:

> "We are aware that we are moving in a region of psychiatry which has not yet been mapped out very well."

The self-incriminating factors in this case, even though "civil" in nature, stem from a criminal act from which the appellants are now incarcerated. Their *counsellors are the agents of their accusers;* therefore, it necessarily follows that their counsellors will not only be biased towards the state, the accuser, but owe a duty of full disclosure to their principal. Any statements made by a defendant will be recorded and eventually used against him even though the statement was made in confidence (doctor-patient relationship).

The federal standards of what constitutes self-incrimination are now applicable to the states through *Malloy v. Hogen*, 378 U.S. 1 (1964), which held that the Fifth Amendment exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the states. Therefore, the Fifth Amendment rights of self-incrimination are also protected by the Fourteenth Amendment against abridgment by the states. Hence the Fifth Amendment rights of self-incrimination are applicable to the states through the Fourteenth Amendment. This shift reflects the essential mainstay of our American system of justice, namely, the accusatorial approach rather than the inquisitorial.

In this case, this fundamental safeguard is abandoned and the inquisitorial system is re-established under a different label called "treatment". In *Gideon v. Wainwright*, 372 U.S. 335 (1963), it was held that provision for counsel in all criminal cases was a "fundamental right, essential to a fair trial" and this was made obligatory on the states through the Fourteenth Amendment. In the *Gideon* case, *supra*, we again dealt with a fundamental right embodied in the Fifth Amendment (self-incrimination). In each of the above cases the fundamental rights embodied in the Fifth and Sixth

Amendments were preserved through the application of the Fourteenth Amendment to the states.

In this case we have a *quasi-civil*, rather than criminal proceeding. Can we now say that the civil nature of the proceedings removes the case and individual from the scope of fundamental rights embodied in the Fifth Amendment? The answer must be "no." The rule against self-incrimination may be invoked by a bankrupt (in the absence of any statute affording him complete immunity) when being examined concerning his estate. *McCarthy v. Arndstein*, 266 U.S. 34 (1924). The *McCarthy* case, *supra* stated that:

> "... the privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it ..." 45 S. Ct., at 17.

Thus, in this case, the defendants were convicted of crimes, found to be defective delinquents by the state, examined by state doctors, who under the guise of attempting to mentally evaluate their patients and treat same, elicited and recorded facts and statements that would eventually be used against them in prolonging their sentence. If the defendants invoke their Fifth Amendment right and refuse to disclose incriminating information, then, this fact alone will be used against them and further their time at the Institution. See *McDonough v. Director, supra*. To invoke their fundamental rights goes against them with the same force as making incriminating statements concerning their past. (See also *Pointer v. Texas*, 380 U.S. 400 (1965).)

Formerly, the rule against double jeopardy existed in Maryland as a matter of common law, not as a constitutional doctrine. *Wampler v. Warden of Maryland Penitentiary*, 218 F. Supp. 876 (D.C. Md. 1963). Now it is a constitutional doctrine.

The double jeopardy factor can best be understood in the case of Samuel Daniels (J.A. 4, 388-450) by first look-

ing to his trial court finding of guilty and later sentencing. After, the finding of guilty of a "nonviolent" offense, the normal sentence that would run with the offense, a duration with limitation, was replaced with a sentence of indefinite duration. The indefinite time period, as opposed to one with maximum and minimum requirements, thus subjects an individual to being placed in double jeopardy. The burden of proof, as in a criminal case, and the burden placed on the state in the same case, becomes reversed at the determination of the finding that one is a defective delinquent. This reversal of positions is predicated upon the use of the terms "civil proceeding" and "treatment." However, in reviewing the "civil proceeding" factor we find that it stems from a criminal trial and replaces a criminal sentence; he was placed in an institution which houses criminals, bars are placed on the windows, the inhabitants of of the institution are guarded by state-paid guards, the institution is operated and run as a penal institution, but set out to the public as a place of treatment. Is this not a legal hoax?

Can we now justify this prison by hanging a meaningless hat on the word "treatment"? Can we say that incarceration at Patuxent Institution is not an actual imprisonment for the original crime for which the individual was convicted? One of the reasons society imprisons those convicted of crimes is to protect society from the so-called future re-occurrences which fall under the guise of rehabilitation. Can we say that imprisoning a man under the guise of rehabilitation is not punishment for the original act committed, when had it not been for the criminal act he would not be imprisoned? Imprisonment in any form, regardless of the label used, is still punishment. *U.S. v. Brown*, 381 U.S. 437 (1965).

Double jeopardy always attaches when an individual is exposed to punishment for a crime. Double jeopardy should not be looked upon as inapplicable just because of the "civil" nature of the case, because there is no difference

between the form of punishment rendered by the state, namely incarceration with and under the aforementioned conditions.

In *Eggleston v. State*, 209 Md. 504, 121 A.2d 698 (1956), the Court said at page 702: "the statutory emphasis is on confinement and treatment". However, in *United States v. Brown, supra*, at page 1720, the Supreme Court said: "that does not make imprisonment any the less punishment." In addition, the confrontation requirements embodied in the Sixth Amendment to the U.S. Constitution are applicable to the states by the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400 (1965).

It is the contention of these Petitioners that in addition to the unfairness of the trial procedure, it is patently unfair and contrary to the American standards of fair play and decency to confine one under an act which has as its *ratio decidendi* the right to treatment and then not give that treatment or determine whether the individual is susceptible to treatment. Persons involuntarily committed by the state to mental institutions should have a constitutional right to treatment grounded in either the prohibition against cruel and unusual punishment of the Eighth Amendment or in the due process or equal protection clauses of the Fourteenth Amendment. *United States ex rel. Schuster v. Herold*, 410 F.2d 1071 (2nd Cir. 1969). See also *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966). In speaking of the right to treatment, the Supreme Judicial Council of Massachusetts in *Mason v. Superintendent of Bridgewater State Hospital*, 233 N.E.2d 908 (Conn. 1968), recognized that treatment must be given as has the majority of commentators in cases which have considered this aspect of involuntary incarceration in supposed mental prisons. *"Mental Illness and the Right to Treatment,"* 77 Yale Law Journal 87; Birnbaum, *"The Right to Treatment,"* 46 Am. Bar Assoc. Journal 499. Interestingly enough, the United States Court of Appeals for the Second Circuit in *Schuster, supra,* cited the opinion of the Fourth Circuit in *Sas v. Maryland*, 334 F.2d 506

(4th Cir. 1965), as standing for the proposition that treatment *must* be given, yet in the case at bar the Fourth Circuit declined to discuss this very issue, notwithstanding the fact that it was vigorously raised and the holding of the Maryland Court of Appeals in *Shields v. Director, supra*, that there is no requirement, that an inmate be given treatment unless the same is appropriate has now been engrafted on the act by the Maryland Courts. Compare *Baxtron v. Herold*, 383 U.S. 107. The Supreme Court of Pennsylvania in the matter of *Commonwealth v. Pifer*, 269 A.2d 909 (Pa. 1970), was not apparently disturbed by the civil-criminal aspect of indeterminate sentences when it held that a commitment of a prisoner for an indefinite time which would exceed the fixed maximum of his normal sentence required that the proceeding be surrounded by due process safeguards and the Pennsylvania Court felt that this was abundantly clear, considering the decision of this Honorable Court in *Specht v. Patterson*, 386 U.S. 605 (1969).

Maryland denies any right to counsel for inmates of the Patuxent Institution during the period of examination at the Institution. *Blann v. Director*, 235 Md. 661, 202 A.2d 722 (1964). In *Timmons v. Peyton*, 360 F.2d 327 (4th Cir. 1966), the Court indicated that there was no reason to assume that reputable counsel and psychiatrists could not cooperate in the administration of tests and the necessary factual investigation of the patient's background to verify or refute his own statements. The same indicia of thought was elucidated by the United States Court of Appeals for the Second Circuit in the *United States v. Driscoll*, 399 F.2d 135 (2nd Cir. 1968). Indeed in New Jersey, see *State v. Whitlow*, 45 N.J. 3, 210 A.2d 763 (1965), that court declared that a person has an absolute right to demand the presence of his own psychiatrist during an examination conducted by a state psychiatrist.

Perhaps most closely analogous to the evidentiary problems under the Maryland law are those set forth in the Wyoming Mental Health Laws discussed by that court in

their case of *Holm v. Wyoming*, 404 P.2d 704 (Wyo. 1965), wherein the Wyoming Legislature passed a law that under mental health commitments, hearsay could be used and that the courts would not be bound by the rules of evidence. It would appear that the Maryland courts have reached the same results by implication that were reached by the Wyoming courts and have unfortunately agreed that for the good of society and perhaps, indeed, the good of the individual, the end does justify the means. The Supreme Court of Wyoming, however, had little difficulty in the matter, notwithstanding the fact that individuals were to be confined and treated for their own interests as well as society's. That court stated:

> "No matter how commendable the motives of the legislation for the mentally ill may be, it still remains a fundamental law of the land, that a person is not to be deprived of his liberty whether by involuntary hospitalization or some other kind of incarceration without due process of law."

Both Maryland and Wyoming have denied due process by relaxation of the rules of evidence. The use of extensive hearsay, which is the entire basis of a defective delinquent's commitment violates his right to due process and the commitments of all Petitioners have been based entirely on such evidence. One must not lose sight of the fact that the Petitioners are incarcerated and although stone walls cannot a prison make, nor iron bars a cage, involuntary confinement behind these walls is effectively an imprisonment as any cage, and semantics, linquistics and labels should not be used to defeat the rights of the individuals or of society which should have a valid interest in the proper confinement and vigorous treatment of persons accused of a crime who are susceptible to rehabilitative techniques. It was well stated by the United States Court of Appeals for the District of Columbia Circuit in *Cross v. Harris*, 418 F.2d 1095 (D.C. Cir. 1969).

> "Congress may legislate to protect many different interests, psychic as well as aesthetic, as well as

> physical and economic, but because it may prohibit ugly billboards because they give offense, they may not lock up ugly people for the same reason. The power to control an evil does not remove all restrictions and the means that may be employed for that purpose. This principle is fundamental to the Constitutional order."

In essence, the trial procedures are a great deal like the "treatment" procedures. They are haphazard and without any objective meaning or checks and balances. *Turck v. Director*, 236 Md. 653, 205 A.2d 397 (1964).

It is therefore the respectful contention of the Petitioners that the procedures embodied in the statute and in the trial are applied in such a manner as to offend the due process requirements of the Fifth Amendment and the confrontation requirements of the Sixth Amendment.

III.

THE PROPOSED OBJECTIVES OF THE ACT ARE NOT BEING SUFFICIENTLY IMPLEMENTED TO SUPPORT ITS CHARACTERIZATION AS A CIVIL PROCEDURE AND TO JUSTIFY THE ELIMINATION OF CONVENTIONAL CRIMINAL PROCEDURE SAFEGUARDS.

Notwithstanding that the act deals only with persons who have been convicted of violation of the criminal law, virtually all actions reviewing the decisions whereby an individual is determined to be a defective delinquent have included in their opinions the bold statement that the Maryland Defective Delinquent Law is civil in nature. *Blizzard v. State*, 218 Md. 384, 147 A.2d 227 (1958); *Purks v. State*, 226 Md. 43, 171 A.2d 726 (1961); *Roberts v. Director*, 226 Md. 643, 172 A.2d 880 (1961); *McDonough v. Director*, 229 Md. 626, 183 A.2d 368 (1962); *Meredith v. Director*, 226 Md. 653, 172 A.2d 501 (1961); *Herrman v. Director*, 229 Md. 613, 182 A.2d 351 (1962); *Hall v. Director*, 245 Md. 687, 226 A.2d (1967); *Walker v. Director*, 6 Md. App. 206, 250 A.2d 900 (1969); *Director v. Daniels*, 243 Md.

16, 221 A.2d 397 (1966). By virtue of the foregoing and many other cases, the label, "civil", has been attached, and consequently, the accused defendant automatically loses conventional criminal safeguards, notwithstanding that the sole reason he is subjected to the act, and all its terrors, is because of his violation of the criminal law. He loses his right to speedy trial, *McCloskey v. Director*,230 Md. 635, 187 A.2d 833 (1963), his right, under the Constitution of Maryland to have the jury judge the law as well as the facts, *Blizzard v. State*, 218 Md. 384 147 A.2d 227 (1958), his right to confront witnesses,*Gray v. Director*, 245 Md. 80, 224 A.2d 849 (1966), his right to bail, *Bullock v. Director*, 231 Md. 629, 190 A.2d 789 (1963), and other rights guaranteed to those caught up in the web of the criminal justice system.

And yet, an individual subjected to the operation of the act is not even afforded those rights granted to civil petitioners in analogous situation. In *Mastromarino v. Director*, 224 Md. 645, 224 A.2d 674 (1966), it was stated that the act, (Article 31B, Annotated Code of Maryland) is not unlike those statutes providing for a civil inquiry into the sanity of a person. Article 59 of the Annotated Code of Maryland establishes the Mental Hygiene Law of the State of Maryland, which is applicable to the civil proceedings. Under the provisions of the act, it is interesting to note that a civil patient, pursuant to the provisions of Article 59, Section 14, has the right to bring a Writ of *Habeas Corpus* "at any time, . . .", and, subject to certain limitations as to subsequent petitions, he has the additional right to file a petition for release in the state equity courts, and is granted thereunder a right to jury trial, Art. 59, Sec. 15(a)(b)(g). This right, "civil" in nature, should be compared to the "civil" relief afforded to those who are determined to be defective delinquents. Before an inmate at Patuxent can seek review of this case, he must have been an adjudicated defective delinquent for at least two (2) years and he must have been confined for a period equal to two-thirds (2/3) of his original criminal sentence. Further, if his initial

review is unsuccessful, he has no right to seek a further review for a period of three (3) years. See Article 31B, Section 10(a), and (b). Although Article 31B, Section 10(c) reserves to an inmate his right to petition for *habeas corpus*, in essence this is a hollow right, since the rights to counsel and appointment of expert witnesses reserved under other provisions of the act for ordinary determination and redetermination hearings are not expressly reserved if an inmate seeks release by means of *habeas corpus*.

The key issue revolves around whether inmates who are committed under these "civil" proceedings, are afforded any treatment, for it would appear that the lack of treatment, itself, is virtually criminal in nature.

In an article, the *Maryland Defective Delinquent Law; an Eight Year Follow Up*, Dr. Boslow and Dr. Kohlmeyer state:

> "Court testimony is a *major and time consuming* part of the Institution's activities" (Emphasis supplied.) (J.A. 4, p. 506).

According to the Court of Appeals, the major and time consuming part of the Institution is theoretically spent in treatment and rehabilitation. It would seem that the Director has himself refuted our Court. In his article, the Director indicates that the law is applied with an uneven hand, because as he states:

> "Juries are greatly susceptible to emotional appeals and have no feeling of responsibility or further knowledge of the individual's social degradations after he is released by them as a collective body." (J.A. 4, p. 507).

The eminent Director goes on to say:

> "That the juries are most likely to release young offenders, angelic in appearance, who are able to produce their mother," (J.A. 4, p. 507).

It would appear, therefore, that the jury can have no understanding of the law. There is also disagreement among

substantial authorities, such as the reported criticism by the eminent penologist Thomas Sanford Bates, who on October 30th, 1959, submitted at the request of the Maryland Board of Corrections, his report on Patuxent with the following: (introduced as Joint Exhibits 57A and 57B). (J.A. Md. 737).

> "Whether the individual has demonstrated persistent, aggravated social behavior, whether he evidenced a propensity towards criminal activity, whether he is found to have either such intellectual deficiencies or emotional unbalance, and whether it can be clearly demonstrated that he is an actual danger to society, all are to be ascertained by the employees of the Patuxent Institution to report to the Court with a possibility of a jury trial ensuing if it is claimed.
>
> "I have never seen the words emotional unbalance used to justify the commitment of an individual for life. It is likewise unclear whether the words intellectual deficiency mean feeble-mindedness with severe mental retardation. Even Patuxent's Director who is a psychiatrist, expresses dissatisfaction with this definition; notwithstanding the fact that in the *Eggleston* case, the Court of Appeals of Maryland determined that proceedings under this act are constitutional. It seems to me that inescapable opportunities for legal action are presented whenever the Institution alleges the presence of those indefinite mental or emotional states.
>
> "This difficulty may not emerge immediately in the cases of many inmates, when they remain in confinement beyond the time their original sentence's have expired, they must inevitably be some protest. Both Dr. Boslow and I feel that a statute similar to New Jersey's would be a much safer definition and it would be less productive of litigation. The New Jersey statute limits the Institution to the custody of the individual for the maximum sentence for the particular crime, subject to the possibility of subse-

quent commitment as a psychotic or feeble-minded person."

In a letter to Mr. J.V. Bennett, Director of the Federal Prison System dated August 7th, 1959, Mr. Bates had the following comment regarding Section 5 of Article 31B, the definition of defective delinquent:

> "Included in this definition are two terms somewhat unfamiliar to the correctional field, intellectual deficiency and emotional unbalance. It would seem obvious immediately that the attempt to contrive a totally indeterminate commitment for persons described in this matter would present legal and practical difficulties, and it is my personal opinion that even with the multitudes of safeguards in the Bill that a person cannot be confined against his will under a definition as indefinite as this one." (J.A. Md. 737)

The entire thought, theory and plea behind the report prepared for Governor Tawes, dated December 17, 1964 (J.A. 4, p. 509), indicates that the select Blue Ribbon Committee, itself, is of the view that the administration of the act has plainly gotten out-of-hand in Patuxent.

Time and again our courts have struck down statutes aimed to suppress undesirable thoughts when a person who had the final authority to do the suppressing, be he censor, chief of police, etc. was one individual. Arbitrary power cannot be lodged in one person; such, however, is not the case in Patuxent.

Petitioners respectfully suggest that the manner of administration of Article 31B is so flagrantly abusive of human rights and dignity that to affix the label, "civil", and to remove the safeguards ordinarily afforded any criminal defendant has the same effect as renaming the Spanish inquisition and calling it a class picnic: you don't change an evil merely by calling it good.

IV.

THE EIGHTH AMENDMENT PROVISIONS AGAINST CRUEL AND UNUSUAL PUNISHMENT IS OFFENDED WHEN THE STATUTORY REQUIREMENT THAT A DEFECTIVE DELINQUENT BE AN "ACTUAL DANGER TO SOCIETY" IS BEING APPLIED TO OFFENSES AGAINST PROPERTY AS WELL AS VIOLENCE AGAINST PERSONS.

In *Sas v. Maryland*, 334 F.2d 506 (4th Cir. 1964) the Court of Appeals directed that in addition to such other points as might be raised in the District Court hearing contemplated, that the District Court should determine whether the interpretation and application of the statutory requirement that a defective delinquent be found to be "an actual danger to society" would violate the Eighth Amendment's prohibition against cruel and unusual punishment when applied to those individuals whose conduct indicate no more than a danger to property rights as opposed to violence to the person. Prompting this determination is the broad definition of a defective delinquent, Article 31(b), Section 5 of the Annotated Code of Maryland and Section 6(a) which lists the offenses which would subject one to a trial determination as to defective delinquent status. The interpretation of including property oriented crimes has received approval by the Court of Appeals of Maryland. *Director v. Daniels*, 243 Md. 16 at 48-49, 221 A.2d 397 (Md. 1966, *cert. den. subnom*) *Avey v. Boslow*, 385 U.S. 940 (1966).

In response to the Fourth Circuit's directions in *Sas, supra*, the District Court in its opinion *Sas, et al. v. Maryland*, 295 F. Supp. 389 (D.C. Md., 1969 at pp. 414-415) found, without determining the issue, that Patuxent only recommended commitment of those individuals whose conduct made them an actual danger to persons as opposed to property. In *Tippett v. Maryland*, 436 F.2d 1153 (4th Cir. 1971) at 1156-1157 the Court of Appeals in footnote 14 following the logic set forth by Judge Watkins, declined to determine the allegations "unless and until the evaluation policies in effect at Patuxent are changed to make operative the classification of which they complain."

Notwithstanding the alleged exclusionary classification, Petitioner Murel was confined to Patuxent in April, 1962 as a result of crimes solely committed against property. (J.A. 4, 93-97). See also, *Cowman v. State*, 220 Md. 207, 151 A.2d 903 (1959), (larceny, larceny after trust, embezzlement, and alcoholism). *Reed V. Warden*, 212 Md. 645, 129 A.2d 92 (1957) (rogue and vagabond), *Palmer v. State*, 215 Md. 142, 137 A.2d 119 (1957) (larceny and breaking and entering), and *Crews v. Director*, 245 Md. 174, 225 A.2d 436 (1967) (false pretenses).

While the basic application of the Defective Delinquent Act is determined in "civil" proceedings as opposed to "criminal" action, it was aptly noted by the Court of Appeals in *Sas, supra*, at page 516,

> "An act which deprives sane men of their liberty by confining them under severe discipline with or without treatment requires a basic fairness of procedure and substance–' implicit in the concept of ordered liberty'–to comport with the guarantees of our National Constitution."

This Court equally in Minnesota *ex rel. Pearson v. Probate Court*, 309 U.S. 270, (1940) and *In Re Winship*, 397 U.S. 358, (1970), held that "civil labels and good intentions do not themselves obviate the need for criminal due process safeguards. . . "

Since the Maryland Court of Appeals in *Director v. Daniels, supra*, has held that crimes committed solely against property as opposed to the person, provide sufficient authority to commit individuals to an indeterminate sentence in Patuxent, and this decision amounts to " . . . a ruling on a question of state law that is as binding on us as though the precise words had been written to the statute." *Terminiello v. Chicago*, 337 U.S. 1 (1949), cited with approval, *Robinson v. California*, 370 U.S. 660 (1962) the Defective Delinquent Statute, must clearly be read to include those persons in Maryland who have committed crimes against property alone. As in *Robinson, supra*, the

existence of a program of treatment is not a condition precedent or subsequent to confinement in Patuxent, *Shields v. Director*, 244 Md. 710, 224 A.2d 107 (1966) and *Director v. Daniels, supra.*

Petitioner Murel like others, whose underlying criminal involvement is directly and solely related to property, may be confined in Patuxent, without treatment, for the rest of his natural life. Even the report of the "Blue Ribbon Committee of December 17th, 1964" (J.A. Md. 509-511) specifically recommended a delineation be made between individuals who have committed offenses against property versus those who have committed offenses against persons, and set forth substantially the same rationale as did those physicians whose testimony Judge Watkins adopted. *Sas, supra,* at 415. But where, as in the case of Petitioner Murel, no treatment is required or provided, and his crimes are solely those against property, and the testimony of the Patuxent physicians notwithstanding, he still remains at Patuxent, with complete approval of the Court of Appeals of Maryland, Petitioners only protection falls within the prohibition against cruel and unusual punishment. His status cannot be determined as a footnote in an otherwise unenlightened decision. *Tippett, supra,* at page 1156-1157, footnote 14.

Murel's original sentence would have expired December 10th, 1962 had he been processed through Maryland's Penal System, though "Even one day in prision would be cruel and unusual punsihment for the crime of having the common cold," *Robinson, supra.* Realistically this Petitioner has disappeared from society with no hope of treatment. While the determination of what is cruel and unusual punishment must depend upon the actual realities of a situation, it is respectfully submitted that to the extent the Defective Delinquent Act, as expanded and approved by the Court of Appeals of Maryland, permits incarceration of those individuals who have committed crimes solely against property, to be confined for an indeterminate period can by no stretch of the judicial imagination not constitute cruel and unusual punishment within the prohibitions of the Eighth Amend-

ment. The application of Article 31B of the Annotated Code of Maryland should be held inapplicable to those persons or class of individuals whose conduct indicates solely a danger to property rights as opposed to violence to the person.

V.

THE PATUXENT INSTITUTION DOES NOT FURNISH SUFFICIENT ACTUAL TREATMENT TO DISTINGUISH ITS INMATES FROM THOSE OF OTHER PENAL INSTITUTIONS SO AS TO SATISFY THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The Court of Appeals of Maryland adopted the view of the Circuit Court for Prince George's County that because the Defective Delinquent Act can be classified as civil in nature you can do just about anything you wish to do. The Petitioners suggest that it is beyond cavil that the records of the trials of Inmates Daniels (J.A. 4, 388), Creswell (Ex. 9), Tippett (Ex. 12-15), Murel (Ex. 10, 11), the testimony of Guard Levy (JA Md. 471-490), the testimony of Inmate Powers (JA Md. 553), Bressler (JA Md. 557), McDonough (JA Md. 602), Mossdale (JA Md. 599), leave it beyond peradventure that, in fact, Patuxent is nothing more than a repository for the socially undesirable, and that, in fact, if one pierces the tragic label of milieu therapy, there is no therapy at Patuxent because there is no time and no staff. The question then resolves itself into whether or not significant treatment for treatable defective delinquents must be furnished or whether the Maryland Courts can ignore the requirements of treatment for, as indicated in *Shields v. State, supra,* there is no need under the Maryland law that treatment be given unless the same is appropriate. It is the contention of the Petitioners that equal protection is sufficient to bridge the gap between the artificial labels of civil and criminal statutes engrafted by the Maryland Courts. *Smith v. Bennett,* 365 U.S. 708, (1961). *Baxstrom v. Herold, supra,* stand vigorously for the proposition that if there is a

distinction between individuals in a class that there be some relevance to the purposes for which the classification is made.

Certainly where the commitment is for the "boys' own good" (Ex. 10, p. 19) as we had in Murel, then there must be something to demonstate that it was indeed for the good of this human being, not a "boy". The distinction drawn between the Maryland Penitentiary and the Patuxent Institute is treatment, however, the treatment is so lax and devoid of results as to amount to no treatment, especially when one views the testimony of the Commissioner of Corrections that he has a greater success rate with second offenders than does the Patuxent Institute (JA. Md. 520). On the subject of treatment, the Court of Appeals of Maryland in *Director v. Daniels*, 243 Md. at 61 found all committed inmates, by virtue of the milieu therapy program are, 221 A.2d 397 in a broad sense, are receiving treatment. This is very similar to saying that all individuals who are in a hospital are receiving treatment in a broad sense, notwithstanding the fact that they rarely see their doctor except when he walks through the hall. The Courts of Maryland and, indeed, the Fourth Circuit in its learned opinion have overlooked and not amply discussed the question of treatment because of the legal proposition that treatment is not required under the Act. The position of the Petitioners is that without a finding of susceptibility of treatment and a positive finding that treatment, in fact, exists and is to be offered to the Petitioners, that Patuxert cannot be sustained. It must be remembered that the American Psychiatric Association had the following to say: (1) The Patuxent is understaffed. (2) The standard at Patuxent is housing, not treatment. (3) There is no doctor-patient relationship where the staff must commit. (4) The program is not properly medically oriented (JA 4, 491-499).

Over one-third (1/3) of the inmates are not receiving active treatment or therapy (JA 4, 518-531) and yet the Maryland Court has stated, *Director v. Daniels*, 243 Md. at 65, 221 A.2d at 446:

> "there was considerable testimony . . . which, if accepted as fact, would indicate at least lapses in the treatment program and the efficient operation of the Institution. This testimony while not wholly rejected does not show such degree of flagrancy as to have a bearing on the constitutional questions here involved . . . , however, we hope that bringing them to light will be noted by the staff for future guidance and reference."

In essence, then, the Maryland Court of Appeals has, in fact, found that there is little treatment at the Patuxent Institute, but that as a result of the hearings perhaps Patuxent will stop experimenting and will try to give treatment to the more flagrant cases which are embarrassing to the Courts in the State. This then, is what happened in the matter of Inmate Tippett, for by the time he came to a hearing before the United States District Court for the District of Maryland he was finally in speech therapy, after eleven years (JA 4 at 87). It would be impossible for counsel, or for this Court for that matter, to feel secure that the only individuals who are going to receive treatment are those who make enough fuss so that their embarrassing records become a matter of notoriety through the Courts. What in essence is the case is that Patuxent is a holding place for maximum security prisoners. Indeed, during recent penitentiary riots, the unruly were sent, of all places, to the Patuxent Institution, assumptively on the basis that the milieu therapy would ease their minds and troubled attitudes (JA 4 at 363, JA 4 at 326). Indeed, in times past, when the Institution became full they stopped having defective delinquents for a while (JA 4 at 356). All in all, it must be boiled down to one significant fact: without one man there would not be a Patuxent Institution for that one man determines whether an individual will or will not be one of the four (4) young men that are in individual active treatment (JA 4, 360) and see *Director v. Daniels*, 243 Md. at page 61, paragraph 7, 221 A.2d at 442, "Individual therapy is also provided at Patuxent on a selective basis but presently only four inmates are receiving this form of treatment, as experience there has

demonstrated that defective delinquents generally do not respond well to this form of therapy." The director has stated "economy of staff time has made group therapy the treatment of choice" (J.A. 4, 503-505). Why this was overlooked by the Maryland Court is unclear. The application of the Defective Delinquent Law changes depending upon experiences (JA 4 at 362) and whether or not one understands milieu therapy (JA 4 at 358). It is respectfully submitted that the record produced in the Courts below do not substantiate that, in fact treatment, recognizable medical treatment, is being given to petitioners and others similarly situated and that the Act cannot be sustained because of this. These petitioners are denied equal protection of the law irrespective of whether one is able to pierce the tyranny of civil-criminal labels when they are not, in fact, given recognizable medical treatment.

VI.

CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION WERE VIOLATED WHEN THE PETITIONERS WERE DENIED LEAVE TO EMPLOY INDEPENDENT PSYCHIATRIC EXPERTS AT GOVERNMENT EXPENSE.

Fundamental to the basic concept of justice and due process of law is the principle that a man's financial resources, or lack thereof, shall in no way prohibit him from gaining access to the equal protection of the laws of the land. In emphasizing this principle with relation to those involved in the criminal justice process, the United States Supreme Court has eloquently set forth "that, to interpose any financial consideration between an indigent prisoner of the State and his exercise of a State right to sue for his liberty is to deny that prisoner the equal protection of the laws." *Smith v. Bennett*, 365 U.S. 708, 709 (1961). This cherished principle, unfortunately, has been disgarded by the courts below, in the present matter.

In this case, a scrutiny of the record in the federal courts below reveals a lack of substantive and up-to-date expert testimony on the part of the Petitioners as to the appro-

priate assessment of Patuxent Institution. Similarly, after the presentation of testimony by experts on behalf of Patuxent Institution, the record reflects no expert testimony introduced by the Petitioners in rebuttal of those advocating the premise that the State of Maryland and the United States of America, and the inmates of Patuxent, are, indeed, fortunate to have access to this Institution. The record does not relfect the presentation of such expertise, because the motion of the Petitioners for leave to employ independent psychiatric witnesses at the expense of the United States was denied. (J.A. 4, 4). The Petitioners, not having financial resources to employ expert witnesses to testify in their behalf, were, therefore, clearly and blatently denied the opportunity for necessary assistance in proving their case. In essence, the Petitioners were denied a fair trial.

In *Roberts v. LaValle*, 389 U.S. 40 (1967), this Honorable Court enunciated the principle that:

> "Our decisions for more than a decade now have made clear the differences in access to instruments needed to indicate legal right, when based upon the financial situation of a defendant are repugnant to the Constitution."

The *Roberts* case involved the denial of a free transcript of a preliminary hearing to an indigent. See, also, *Draper v. Washington*, 372 U.S. 487 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1966), and *Long v. District Court of Iowa*, 385 U.S. 192 (1966).

It is respectfully submitted that it cannot be said that the right to certain typewritten pages, namely the transcript of the hearing, is any more sacred a right than the right to have the availability of experts to assist an indigent in the presentation of his case, where such expert assistance is a most fundamental aspect and requirement of the litigation at hand.

An interesting example of the perils of denying the indigent his day in court is exemplified in the case of *Bush v. Texas*, 372 U.S. 586 (1963), where the State repeatedly

rejected the Defendant's plea for the services of a psychiatrist. Not until the Defendant had been convicted and his appeal had been carried to the United States Supreme Court was there recognition that the Defendant may have been prejudiced by the State's refusal to furnish the indigent Defendant a psychiatrist. The eloquent statement of the Federal Court in *Bush, supra,* is most appropriate in relation to the discussion of the case at hand:

> "The right to counsel is meaningless if the lawyer is unable to make an effective defense because he has no funds to provide the specialized testimony which the case requires . . . . In order for Bush in the instant case to have the effective aid of counsel, it was necessary for his counsel to have the effective assistance of a qualified psychiatrist in a trial, without expert evidence as to sanity, which found him sane and resulted in a life sentence. It is so lacking in fairness as to be a denial of liberty without due process of law." Cf. *Greer v. Beto,* 379 F.2d 923 (5th Cir. 1967).

Similarly, in the present matter, the Petitioners were denied access to the specialized testimony required in their case. They were denied this access because, and only because, they had the misfortune to be in a position where they could not afford to hire qualified experts to present testimony in their behalf. Such prohibitions, it is respectfully submitted, clearly render the requirement of effective assistance of counsel meaningless and the requirement of a fair trial and due process of law meaningless, as well.

Not only were the Petitioners denied the right to assistance of qualified experts in the trial court below, because of their indigency, but the denial of expert assistance permeates the entire defective delinquent process. While the Annotated Code of Maryland, Section 7(b), Article 31(b) provides for the services of an independent psychiatrist after a determination has been made by the staff of Patuxent as to whether or not the individual involved is a defective delin-

quent there is no provision whatsoever for the affording of services of an independent expert to assist the potential defective delinquent at the preliminary stages, stages which most certainly must be characterized as critical to the defective delinquent process.

The Supreme Court of New Jersey, in the case of *State v. Whitlow*, 45 N.J. 3, 210 A.2d 763 (1965), declared that a person has an absolute right to demand the presence of his own psychiatrist during an examination conducted by the State psychiatrist. This is certainly not provided under the present Maryland statutory scheme, and the lack of such provision denies the Petitioners a most cherished right, the right to "due process" under the Fourteenth Amendment. The distinguished United States Court of Appeals for the Fourth Circuit recently enunciated certain principles that the Petitioners respectfully suggest should have been remembered in the judicial decision making process in the present case:

> "When the State has marshalled all its forces against such creatures as the Petitioner and has convicted a man who was in law insane by denying him fair opportunity to carry his very heavy burden of proof, he has been denied due process under the Fourteenth Amendment." *Timmons v. Peyton*, 360 F.2d 327, 333 (4th Cir. 1966).

The Fourth Circuit in *Timmons, supra*, a case involving the right to counsel, quoted the eloquent dissenting words of Mr. Justice Frankfurter in *Leland v. Oregon*, 343 U.S. 790 (1951):

> "A muscular contradiction resulting in a homicide does not constitute murder. Even though a person be the immediate occasion of another's death, *he is not a deodand to be forfeited like a thing in the medieval law.* Behind a muscular contradiction resulting in another's death, there must be culpability to turn homicide into murder." (Emphasis added.)

Similarly, the Petitioners in this matter are not "deodands to be forfeited like a thing in the medieval law." Unfortunately, this has been the case to date.

The distinguished United States District Court Judge in his lengthy opinion in this matter, was most complimentary in his assessment of the testimony of the expert witnesses advocating the cause of Patuxent Institution (JA 4, 58). As in the case at the preliminary stages of the defective delinquent process, and as it was at the trial of this matter before the United States District Court, there could be no compliments for the Petitioners as to their presentation of expert testimony. The reason—the Petitioners are indigent, and they cannot afford the luxury of supporting their case with expertise. The inscription on the United States Supreme Court Building states: "Equal Justice Under Law. Justice the Guardian of Liberty." There is no question that the aforementioned phraseology cannot, at this time, be applied to the defective delinquent process of the State of Maryland, nor the judicial process afforded to the Petitioners.

It is therefore the respectful contention of the Petitioners that the constitutional rights to due process of law and equal protection of the law were denied to the Petitioners when they were denied leave to employ an independent psychiatric witness at the expense of the Government. It is respectfully requested that this Honorable Court should issue its Order declaring Article 31B of the Maryland Code unconstitutional for its failure to provide the Petitioners with the right to independent expert assistance at all stages of the proceedings, or, in the alternative, that this Honorable Court issue its Order requiring the State of Maryland to provide indigents independent psychiatric assistance from the time that the indigents are under consideration for incarceration at Patuxent Institution. Additionally, it is respectfully submitted that this Honorable Court should issue its Order requiring a new trial of this matter, and that the Petitioners be granted leave to employ an independent psychiatric witness at the expense of the government.

VII

THE PETITIONERS WERE DENIED DUE PROCESS OF LAW BY THE INITIATION OF COMMITMENT PROCEEDINGS UNDER A STATUTE THAT REQUIRES ALLEGATIONS OF MERE SUPPOSITION OR SUSPICION OF DEFECTIVE DELINQUENCY AND WHERE THAT STATUTE PERMITS A COURT ORDER TO BE ENTERED *EX PARTE* WITHOUT NOTICE OR HEARING AND WITHOUT THE ASSISTANCE OF ANY COUNSEL FOR THE ACCUSED

The statutory process for determination of defective delinquency is begun by a request made to a court that a person be examined for possible defective delinquency. Act, § 6. Section 6(b) provides that a request "may be made by the Department of Corrections or by the State's attorney or assistant State's attorney who prosecuted the person . . . on any knowledge or suspicion of the presence of defective delinquency in such person." Under Section 6(d) the request for examination is made by petition filed with the court "stating therein the reasons for suspecting or supposing the presence of defective delinquency in said person." Section 6(d) requires neither notice nor hearing, but only that the court issue a "formal written order directed to the Patuxent Institution."

Under Section 6(e), the person who is the subject of the order of examination is "retained in custody . . . until such time as the procedures . . . for the determination of whether or not said person is a defective delinquent have been completed, without regard to whether or not the criminal sentence to which he was last sentenced has expired." Thus a person whose sentence has expired must remain in Patuxent for whatever period it takes for a determination of defective delinquency. *Maryland v. Musgrove*, 241 Md. 521, 217 A.2d 247 (1966); *cf. Daugherty v. Maryland*, 355 F.2d 803 (4th Cir. 1966). See also, *Carter v. Director, Patuxent Institution*, 10 Md. App. 247, 269 A.2d 172 (1970). While it generally takes

sixty to ninety days for the examination, "lamentably, it generally takes around nine months to a year to hear the case." (J.A. Md. 669). During that period, the inmate is not eligible for individual or group therapy (J.A. Md. 414, 634-635); (J.A. 4, 206), is not removed from the receiving tier of the Institution, and apparently is not included in academic or vocational training.

A request for examination need only state "the reasons for *suspecting or supposing* the presence of defective delinquency in the said person." (emphasis added). Presumably, the court, in ordering such examination, does so on the basis of suppositions and suspicions presented. This type of a standard is too vague and too subjective to withstand constitutional scrutiny. There exists no rationale for such an abstruse and occult standard. Compare: *Terry v. Ohio*, 392 U.S. 1 (1968); *Beck v. Ohio*, 379 U.S. 89 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969).

The determination of the court is based largely upon an *ex parte* review of the petition. At this time there is no opportunity given to the subject to challenge the reasons given or the factual information, if in fact any exists. He is neither notified of the request nor given an opportunity to be heard. The court, when ordering the examination, need not even present its reasons for doing so. The determination is left in the court's unreviewable discretion, which, in turn, is based solely upon the allegations of mere suspicion put forth by the State. Such procedure as this, clearly runs afoul of basic constitutional principles. See: *Timmons v. Peyton*, 360 F.2d 327 (4th Cir. 1966); *Miller v. Blalock*, 356 F.2d 273 (4th Cir. 1966).

It is respectfully submitted that the order of determination "is a 'critically important' action in determining vitally important statutory rights . . ." of the person. *Kent v. United States*, 383 U.S. 541, 556 (1966). The *Kent* case involves the waiver of jurisdiction by a juvenile court to the adult criminal court of a juvenile. Juvenile waiver is analogous to commitment for examination under

the Maryland Defective Delinquent statute and that both represent the initial judicial determination of whether or not to channel the person involved through a more or less serious set of procedures. The court in the *Kent*, case, *supra*, stated:

> ". . . there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons." *Id.* at 554.

The proceedings under Section 6 commencing commitments are of even greater "critical importance" to the persons affected than the waiver hearings in *Kent*. The failure to test the petition for examination through appropriate processes can lead to the kind of injustice, illustrated in the *Daniels* case, there it was found, after a prolonged period of confinement, that Daniels did not come within the listed categories of offenses. See *Sas v. Maryland*, 295 F. Supp. 389, 394 n. 5 (D. Md. 1969). It is also interesting to note as mentioned above, that the request for examination may be made by the Department of Corrections, the State's Attorney or Assistant State's Attorney who prosecuted the case, said person, not being a member of the medical profession, psychiatrist or psychologist, or one versed in such areas.

The looseness of these standards and procedures, are not unlike those in the case of *In Re Gault*, 387 U.S. 1, (1967), where the constitutional guaranty of due process of law was violated when a petition alleging delinquency made no reference to any factual basis for the judicial action which it initiated. Such is the case here. It is highly doubtful that any of the persons selected to be examined for commitment to the Patuxent Institution, have been chosen on any rational or non-discriminatory basis, either by the courts in their orders or by the State officials who have such wide discretion, to initiate the proceedings.

Such processes cannot be reconciled with due process of law.

VIII

PETITIONERS WERE DEPRIVED OF DUE PROCESSES OF LAW DURING THE EXAMINATION STAGE OF THEIR CONFINEMENT AT PATUXENT AND/OR IN THE FINDING BY THE INSTITUTION OF THEIR DEFECTIVE DELINQUENCY AS A RESULT OF THE PATENTLY INHERENT UNRELIABILITY OF THE FACT FINDING PROCESSES AND THE ESSENTIAL PROCEDURAL UNFAIRNESS OF ADMINISTRATIVE ADJUDICATION BY THE INSTITUTION ITSELF

The period of time of confinement at the Patuxent Institution for the purpose of "examination" and "finding" of suspected or supposed defective delinquency is a critical part of the process leading to commitment. It is during this period, that there is noticeably absent, any procedural safeguards necessary to insure "the regularity and the exercise of care implied in the phrase "due process." *In Re Gault, supra.* It is during the months, or even years of that commitment, that vital determinations and findings are made. The manner of proceeding, however, during this period, falls grossly below those minimum standards imposed by the Fourteenth Amendment in its guarantee that no person shall be deprived of liberty without due process of law.

A. The Statutory Provisions

Section 7(a) of the Act provides that "examination shall be made by at least three persons on behalf of the institution for defective delinquents . . . They shall assemble all pertinent information about the person to be examined. . . . On the basis of all the assembled information, plus their own personal examination and study of the said person, they shall determine whether in their opinion, or in the opinion of a majority of them, the said person is or is not a defective delinquent."

If three or more persons voting decide that a person is not a defective delinquent, all proceedings against him must cease.

> "If the substance of the report is that the person is not a defective delinquent, he shall be retained in the custody of the Department of Correction under his original sentence as if he had not been examined for possible defective delinquency."

The staff finding of this category is final and conclusive.

If those staff personnel voting decide that the person is a defective delinquent, that judgment is forwarded to the Court:

> "They shall state their findings in a written report addressed to the court, no later than six months from the date said person was received in the Institution for examination, or before the expiration of sentence, whichever last occurs."

Under Section 8(a), this report mandates judicial proceedings.

> "If the institution in its report on any person shall state that he is a defective delinquent, the Court shall forthwith summon the person before it and advise him of the substance of the report and of the pendency of the hearing hereinafter provided. . ."

Counsel for the person and the State are given the right to have access to a copy of the report of the institution, under Section 8(b).

This report is usually the State's case, and it is interesting to note that this report, is received as evidence and may be the basis for a finding of defective delinquency, notwithstanding no opportunity for cross-examination exists. *Purks v. Maryland*, 226 Md. 43, 171 A.2d 726 (1961); *Schlatter v. Director of Patuxent Institution*, 238 Md. 132, 207 A.2d 653 (1965); *Gray v. Director of Patuxent Institution*, 245 Md. 80, 224 A.2d 879 (1966).

Considering the significance of examination and judgment by the Patuxent staff, it is remarkable that no safeguards attend the processes to insure their accuracy, reliability, and essential fairness.

B. The Fact-Finding Process

Section 7(a) of the Act, imposes upon the staff the obligation to assemble "all pertinent information about the person to be examined." The staff is directed to obtain a complete statement of the crime for which he has been sentenced, as well as the circumstances of such crime,[12] the court in which he was sentenced, the nature of the sentence, copies of any probation or other reports which may have been made about him, and reports as to his social, physical, mental and psychiatric condition and history."

To carry out this broad statutory mandate, the Defendant is placed in a receiving area and interviewed by a member of the Classification Committee and the Social Service Committee.

The suspected defective delinquent, is contacted and interviewed to elicit whatever information can be gotten from his early history and his developmental growth. Agencies such as the F.B.I., the courts, juvenile courts, probation departments, and all other agencies who may have had contact with the suspected defective delinquent, are contacted. (JAMD, 621-622; J.A. 4. 205, 209-210, 275).

For most persons, the search goes back into the earliest childhood for evidences of "antisocial behavior." The staff finds useful in many cases to go far back as to the time when the suspect was eight years old. (J.A. 4. 275).

---

[12] It is not clear how the facts that show "a complete statement of the crime" and "the circumstances of such crime" are obtained.

The subject also goes to a battery of tests and interrogations by a psychiatrist and psychologist assigned to examine him. This series of "formal examinations" does not start until the suspect has been confined at Patuxent for a substantial time, estimated at some 40 to 45 days in most cases. (J.A. 4. 212). The total time consumed by the Patuxent staff in completing their examination is said to be 60 to 90 days. (J.A. 4. 212).

During the period of formal examination, considerable pressure is exerted upon the suspect to submit to the probings. If the person refuses to report to an assigned meeting, he is subject to punishment. (J.A. 4. 217). Even if the suspect previously declared that he does not want to speak to the doctors or take any of the examinations, he is regularly summoned. (J.A. 4. 219, 322-323). Every time there is a refusal, a disciplinary report is written on him. And as the number of refusals mounts, an ascending scale of penalties is imposed on him. (J.A. 4. 121, 220). Any person who does not submit to the interrogations and examinations, is frozen in the receiving tier of the Institution indefinitely. (J.A. 4. 217).

A case in point, is the petitioner Bradley A. Avey. Avey has been at Patuxent since November or December of 1965 and at the time of the argument in the Fourth Circuit in the United States Court of Appeals, was still on the receiving tier (J.A. 4. 68-70). Avey, acting on the advice of counsel, refused to submit to any of the doctors. (J.A. 4. 68-69). Concerning Mr. Avey, Dr. Kandel, of the Institution stated that if he persists in refusing to be examined, he will be kept indefinitely on the receiving tier (J.A. 4, 281-282). The Director of the Institution was asked whether the person could remain at Patuxent indefinitely without being classified and he responded: "Under the present state of things, yes." (J.A. 4. 311). This apparently was not the case previously for one William McDonough, at his hearing testified that he refused to submit to an examination on the ground that it vio-

lated his privilege against self-incrimination. Nevertheless, he was found to be a defective delinquent on the basis of testimony as to his "hostility." Mr. McDonough asserted his commitment to Patuxent was based solely on his "being hostile for invoking the Fifth Amendment." (JA MD, 602).

C. The Adjudicative Process

When the fact-gathering process and the "formal examinations" are completed on those suspects who corporate a conference is scheduled for the statutory members of the examination team. A staff conference is held where the staff presents their material and each person dealing with his particular area. (JA MD 622). It is interesting to note, that the subject is not present during this portion of the conference, he is given no notice whatsoever of the "fact" that will be laid before the conference for its consideration; he has no opportunity or means to discover what assertions or allegations have been incorporated into his file nor is he informed of the results of the direct examinations and probings conducted within the Institution itself. (J.A. 4. 203, 237).

It is following the reporting of the file to the assembled staff, that the subject is brought into the room for further interrogation. (J.A. Md. 622). It is at this time that "his life history" is discussed with him including the questions to elicit and to determine his past criminal record, antisocial and criminal behavior, as well as questions dealing with his intellectual level and emotional status. (J.A. Md. 622; J.A. 4. 236).

As a result of the interrogation that the staff chooses to undertake, it is sometimes confronted with conflict between the facts as stated by the person under examination and the facts submitted by one of the several outside sources from which they have come. When this happens the staff tries to find out which assertion is correct "as best we could."

(J.A. 4. 207; J.A. Md. 623-624). It is interesting to note that there are very few conflicts which the staff considers to be critical significance in making a decision on defective delinquency. (J.A. 4. 275-276). Even when they cannot resolve the conflict to their own satisfaction, the staff still proceeds to make their decisions as required under the Act and forward their finding to the Court with multiple versions of the fact. (J.A. 4. 208-209; J.A. Md. 623).

D. The Essential Unreliability and Unfairness of Process at this Critical Stage

Manifestly there is grave danger of prejudice, whether intentional or not, in these fact-finding and adjudicative processes that take place over a period of months within the private recesses of Patuxent Institution. Constitutional rights cannot be made dependent upon the benign good will that the professional staff of Patuxent may be assumed *arguendo* to have. Commitments that are potentially lifetime in duration are at stake. The power of the State is being brought to bear against an individual who may or may not realize the full extent of his jeopardy. It is not an acceptable substitute for constitutionally acceptable processes that the agents of the State may believe that, in part, they are helping the subject of their proceedings. Plainly written on the face of the statute is the purpose of incapacitating by *incarcerating* persons who "clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment." From the standpoint of the individual, this is a proceeding of potentially enormous consequence, far beyond all but the most serious criminal prosecutions. In light of the potentialities, and the stated purpose of incarcerating for the protection of society, every significant stage of the process must comport with constitutional prescriptions of due process of law.

The fact-finding process that are undertaken at Patuxent bristle with potential unreliability. Inquiries are directed broadside to persons and agencies that may have had contact with the individual under scrutiny. A melange of responses of uncertain dubiety can be expected. The careful screening attending judicial fact-finding is wholly missing. Rumor and gossip could enter without check. Respondents motivated by ill will toward the person in question could vent their spleens against him. Worse, perhaps, completely false or partially misleading information could enter through lapses of memory or simple mistakes by respondents. Nothing in the procedures employed by the Patuxent fact-gathering protects against the gross harm to the subject that is inevitable when a dossier is compiled in secret and permanently sealed against disclosure to anyone who might challenge its contents.

The possible unreliability of responses is not confined, of course, to private persons and agencies. Official reports, based upon records about individuals, are not uniformly accurate.

Within Patuxent, there are multiple sources for unreliable data. The battery of tests administered to the person are all capable of mal-administration. Far greater dangers arise when the testing involves questions of judgment and discretion. Nothing in the procedures described during the extensive diagnostic period assures the subject against failures and mistakes. He has no professional resources of his own to which he can turn. At no point in the entire process, even at the final stage of judicial confirmation at the Patuxent finding, does the subject have a right to independent psychological testing and counseling. The provision for a "practitioner of psychiatry" in Section 7(b), whatever its value to the court proceeding, is not applicable at the critical stage of the administrators' key finding of defective delinquency.

The situation of the examinee under the defective delinquent statute is comparable to that of persons suspected of

being sexual psychopaths under the ubiquitous sexual psychopath statutes. See *The Sexual Psychopath and the Law*, in the *Mentally Disabled and the Law* 314-326 (Lindman and McIntyre ed. 1961). Sexual psychopath laws, like Maryland's defective delinquent statute, do not punish the individual for one isolated act, they require a pattern of deviation in behavior.

> "There is no requirement that this pattern be found only in police or court records; it may also be found in answers the accused makes to the court psychiatrist. Quite frequently the accused will 'confess' prior acts that never have and never will come before a criminal court. Nevertheless, these acts may be the basis for finding that the individual is a sexual psychopath. Thus in such instances, hospitalization might not rest upon the act for which the individual was accused or convicted but rather on prior unrecorded, unconfirmed acts to which the individual confesses or of which he is accused." *Id.* at 308.

The only meager check against the plethora of potential errors is the interrogation at the staff conference. The context to which the person is given any notice at all of the contents of his file is entirely within the unfettered discretion of the staff members present. To the extent that the person is allowed to learn some of the file's contents, he has neither the time nor the resources to make any real rebuttal. No possibility of his investigating the facts and producing counter evidence is afforded. Indeed, the person is not expected to produce any material at all to extract himself from his precarious situation. The staff plays with a "closed hand" which he is powerless to measure or contest. There is no one acting on the suspect's behalf present to challenge or protest allegations made or the procedures by which alleged facts were discovered.

1. *Right to Counsel During Examination*

The Court has already indicated, in circumstances not unlike the examination phase of Patuxent commitments, that the basic due process right to counsel applies. *Timmons v. Peyton*, 360 F.2d 327 (4th Cir. 1966) (en banc); *Miller v. Blalock*, 356 F.2d 273 (4th Cir. 1966); and see *Williams v. Blalock*, 280 F. Supp. 298 (W.D. Va. 1968). The Court did not hold that the accused may have his lawyer present during actual psychiatric tests,[13] but the Court did note the value of counsel representing the person throughout this critical stage: ". . . There is no reason to assume that reputable counsel and psychiatrists could not cooperate in the administration of tests and the necessary factual investigation of the patient's background to verify or refute his own statements." *Timmons v. Peyton, supra*, at 331.

The Court of Appeals for the Second Circuit has further elaborated on the value and the need for persons to have the assistance of counsel during their examinations by State psychiatrists. The Second Circuit noted that the person could consult with counsel before the examinations so that he could fully and intelligently respond to the doctor's questions. The court acknowledged that a person might give different answers if he is told of the potential use of his statements and allowed to consult his lawyer about the significance of his words, but the court would not assume that the answers would for that reason be dishonest; the court believed that they might have been more complete and more focussed on the issues to come before a tribunal thereafter. *United States v. Driscoll*, 399 F.2d 135 (2nd Cir. 1968).

Maryland denies any right to counsel to inmates of Patuxent during the period of examination in the Institution. *Blann v. Director*, 235 Md. 661, 202 A.2d 722

---

[13]See also *United States v. Albright*, 338 F.2d 719 (4th Cir. 1968).

(1964). Thus, the most basic protection against unreliable fact-finding during the examination stage is absent.

2. *Right to Assistance of Experts During Examinations*

In *Timmons* and *Miller*, this Court recognized that a person needs to have resources to test the validity of the examinations and findings of the State's experts. The Supreme Court of New Jersey has declared that a person has an absolute right to demand the presence of his own psychiatrist during the examinations conducted by State psychiatrists. *New Jersey v. Whitlow*, 45 N.J. 3, 210 A.2d 763 (1965). The New Jersey Supreme Court obviously believed that the presence of another expert in the examination room would not be disruptive, although that court would permit counsel for the defendant to attend only with the consent of the State psychiatrist.

Maryland, as previously indicated, does not provide for the person to have any expert counselling or assistance whatsoever during the examination processes.

3. *Right to Have Counsel Present During Staff Conference*

The right to counsel during the personal examinations of persons has not been extended to the psychiatric interview by this court, presumably because of the possibility of disturbing that delicate process. However, there is no similar reason for preventing a defendant from having his attorney present at the entire staff conference proceedings that lead to the adjudication by the Institution. See, on this point, the illuminating discussion by the Court of Appeals for the District of Columbia Circuit. *Thornton v. Corcoran*, 407 F.2d 695 (D.C. Cir. 1969). "A lawyer is undeniably a 'third party' to the doctor-patient relationship. As such, physicians may feel he is a fatally disruptive influence. But the staff conference is hardly as private and as individualized an encounter. The individual

under examination faces a number of staff members, most of whom he has never seen before. The argument that a lawyer will prove a fatally disruptive influence at such a hearing is not compelling." *Id.* at 701. Compare the constitutional guarantee of the right of presence of a defense attorney at lineups. *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967).

E. Subsequent Judicial Proceeding not Curative

The Defective Delinquent Act contains provision for a judicial hearing following the examination and finding stages. Under Section 8, various procedural requirements are established for the conduct of that hearing in court. The Act speaks with much greater depth to the manner of judicial hearing than it does to the manner of the examination and finding that take place behind the walls at Patuxent. The contention may be anticipated, therefore, that the subsequent judicial hearing provides the constitutionally necessary inquiry that is fair and reliable. Thus, it may be said, even if the Patuxent stage of the proceedings lacks the essential requisites of verity and due process, the harm is cured by the judicial proceeding to follow.

We believe that this argument of a curative judicial proceeding is invalid. First, the judicial proceeding is itself assailable on multiple grounds as constitutionally flawed. To some extent this is now manifest on the face of the statute; to some extent it is the product of the interpretations that the Maryland courts have made of the Act. As will be developed in the subsequent section of this brief, the judicial hearing is now but a weak echo of conclusions already reached at Patuxent.

Second, and more basically, the proceedings during examination and finding at Patuxent should be required to meet constitutional norms even if there might follow a judicial hearing that did not itself violate the Constitution. The Patuxent processes are critical stages. A staff finding of

non-defective delinquency legally forecloses further prosecution toward commitment. A collective judgment is made at this point with great consequences to the person involved. Moreover, whether one looks at this collective staff conference or at the earlier "personal examinations" it is necessarily true that the conclusions reached by the professional experts will derive from an accumulating pastiche of data of varying credibility, authenticity and origin. Once that professional assessment is made, it is quite impossible for the expert, or a third party, to retrace all the inputs that have affected the conclusion.

If and when the staff members later testify in court, they will be in the position of justifying and rationalizing a conclusion previously reached and formally reported. They cannot wash their minds of inadmissible data. Inevitably, the conclusions of these experts will carry a heavy weight in the judicial proceedings. In the Maryland courts, their conclusions are treated with extraordinary deference. It is vital, therefore, to assure that the original impressions and conclusions will be formed by constitutionally acceptable means.

Thus, we submit that the constitutional errors that infect the proceedings during the examinations and findings cannot be and are not legally curable.

IX

PETITIONERS' RIGHTS AGAINST SELF-INCRIMINATION ARE VIOLATED BY THE UNYIELDING COMPULSION UPON PERSONS SENT TO PATUXENT FOR EXAMINATION TO SUBMIT TO IN-DEPTH INTERROGATION AND TESTING IN THE TOTAL ABSENCE OF PROCEDURAL SAFEGUARDS

The Petitioners contend that the compulsion asserted against persons sent to Patuxent to submit to examinations against their wills violates the Fifth/Fourteenth Amendment right against self-incrimination. Even assuming, *arguendo*, that the information which the Patuxent

staff extracted from the persons referred for examination was completely reliable yet nevertheless, the "suction process" by which it is obtained is unconstitutional.

The Director and Associate Director of the Institution both testified that in depth examinations of all persons sent to Patuxent are a *sine qua non* of a determination by the staff that they are or are not defective delinquents. It was their view that it was absolutely impossible to diagnose defective delinquency without such examinations. (J.A. 4, 223, 310). We have previously mentioned that when a person has been referred to Patuxent and refuses to submit to such examinations, he is "frozen" indefinitely on the receiving ward of the Institution. (J.A. 4, 68-70, 281-282, 311).

When an inmate fails to resist, or his resistance is finally broken, he is interrogated in depth. The Social Service people attempt to "elicit whatever information can be gotten from the patient's early history, (and) his developmental growth. . ." (J.A. Md. 621). Formal examinations are conducted by a psychiatrist, a psychologist and a physician, pursuant to Section 7(a) of the Act. The statute directs these officials to assemble all pertinent information about the individual that might show "persistent aggravated antisocial *or* criminal behavior." Act, § 5 (emphasis supplied). It should be noted that the statute does not confine the inquiry to behavior in violation of penal laws, but in fact, all antisocial behavior is pertinent. Within the ambit of criminal behavior, it is not necessary that all incidents appear on record as convictions, or even arrests, and the examiners are directed to include "a complete statement of the crime for which he has been sentenced, (and) the circumstances of such crime." Act § 7(a). Maryland Court of Appeals has declared that this "personal examination" is legally compulsory on the examiners. They could not eliminate it if they wished. *Maryland v. Musgrove* 241 Md. 521, 217 A.2d 247 (1966). As mentioned before, after all of the above examinations, the

subject is examined again in his personal appearance before the staff conference.

The personal appearance before the staff conference is treated as essential to the finding by the Institution. When the subject is brought before the staff, "his life history is discussed with him in longitudinal details." (J.A. Md. 622). Those matters which are inquired into are basically as follows:

> "[T]here are a series of questions to elicit and to determine the past criminal record, antisocial and criminal behavior of the individual. There would then be another series of questions dealing with the intellectual level and emotional status of the individual and any such questions as seemed appropriate that might help us (the staff) determine whether he is a potential danger to the community." (J.A. 4, 236). "Yes, when we talk to the patient we go over the material with him and discuss his difficulties in the community. If he was a child, his truancy, his antisocial behavior, his conflict with authorities, *all the details we can possibly get into.*" (J.A. Md. 622) (emphasis supplied).

This Court has declared that the Fifth Amendment privilege against self-incrimination is fully applicable to State proceedings. *Malloy v. Hogan*, 378 U.S. 1 (1964); *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964). The privilege applies where the proceeding is labeled "criminal" or "civil."

> "The language of the Fifth Amendment, applicable to the states by operation of the Fourteenth Amendment, is unequivocal and without exception and the scope of the privilege is comprehensive." Application of Gault, 387 U.S. 1, 47 (1967).

The Maryland courts and the courts below committed a fundamental error in failing to recognize the violation of the Fifth Amendment that is patent in the compulsory examination of inmates at Patuxent. The District Court said that the purpose of the compulsory interrogation was

not to gain evidence to prove the subject has committed a crime, but rather to discover the inmates mental condition. *Sas v. Maryland* 295 F. Supp. 389 at 411. The lower courts, did not recognize that the awful impact of incrimination occurs entirely within the pending proceeding to incarcerate the person potentially for the rest of his life. The suction process draws out of the mouths and minds of persons under examination the basis for their own doom, "all the details we can possibly get into." In essence, the subject is made the architect of the destruction of his own liberty, and he himself builds the walls within which he is confined. It is no answer to say that the defective delinquency proceedings are "civil" rather than "criminal". For as *Gault, supra* declares, the Constitution is not to be evaded by labels.

It is also contended that the compulsory examinations of the Institution are unexcused and unmitigated violations of the Fifth Amendment. The only limits on the extent of inquiry are those self-imposed by the inquisitors. Nothing is done to inform the subjects of the examinations that there are any restrictions upon the investigation. Needless to say, nothing is done to assure that there will not be any overreaching in the interrogations as they occur.

The principle we are discussing here is analogous to the problems of incustody interrogation of criminal defendants. This Court has established a series of procedural safeguards to insure that the privilege against self-incrimination would not be lost through lack of awareness of this privilege, or through lack of real understanding and intelligent exercise of it. The right to have counsel present at the interrogation was held to be indispensible in the protection of the Fifth Amendment. See also *Orozco v. Texas,* 394 U.S. 324 (1969), where the Court held that use of admissions obtained from an interrogation of an accused at his lodging at 4 a.m., in absence of the *Miranda* warnings, was a violation of the Self-Incrimination Clause.

The record in this case indicates that no systematic effort is made to adivse the inmates of the right against self-incrimination or their right to remain silent. (J.A. 4, 240-241). In fact, this was best summed up by Dr. Kandel when he stated: "We don't give any inmate any warnings of any sort." (J.A. 4, 243) In addition, the examiners do not advise their subjects that they will repeat later what the subjects disclose even though it is cloaked with the apparent confidence of a doctor-patient relationship. (J.A. 4, 279-280).

Under the Act, an inmate does not even have the right to have counsel during this critical stage of the proceedings against him. *Blann v. Director*, 235 Md. 661, 202 A.2d 722 (1964). The right to counsel only begins at the judicial stage, after the harm has been accomplished. Act, § 8(b). Much has been written recently regarding the need for counsel at sanity hearings and that it, in fact, is founded on the Constitution. Note, *Right to Counsel at the Pretrial Mental Examination of an Accused*, 118 U. PA. L. REV. 448 (1970).

The violations of the Fifth Amendment, that occur at the examination and fact finding stages cannot be cleansed by the subsequent judicial hearing.

It should be noted that the self-incrimination argument advanced here relates to the evils inherent in the compulsion over and above the evils that may flow from the use to which the product of compulsion may be put. The extreme nature of the compulsion applied to persons confined for examination at Patuxent is so egregious that it must stand on its own footing as depriving persons of their constitutional rights. The resisting inmate, who refuses to disclose the information that might lead to his diagnosis as a defective delinquent, is frozen in custody for an indeterminate time. Potentially, he could remain in that status for the rest of his life. Such an inmate will never get to a judicial hearing where the product of his compelled examination can be filtered out; and of course, if he speaks

and discloses all to the staff of Patuxent, he builds his own enclosure.

Such abuses have been tolerated in the past, but should not and cannot be tolerated in the future. It is vehemently urged to this most distinguished Court that *the future is now!*

X

PETITIONERS' RIGHTS TO CONFRONT AND EXAMINE WITNESSES AGAINST THEM IN A JUDICIAL HEARING FOR DETERMINATION OF THEIR DEFECTIVE DELINQUENCY ARE INADEQUATELY PRESERVED BY THE STATUTORY SCHEME OF DEFECTIVE DELINQUENT PROCEEDINGS.

The Maryland courts have held that the written report from the Institution prepared by the staff at Patuxent [Act, Sec. 7 (a)] is admissible in evidence at the commitment hearing. The regular procedure in judicial hearings is for a member of the Patuxent staff to read the report, which contains the work and conclusions of other staff members as well as other information which no member has first hand knowledge. The director usually appears for the staff but it has been held that

> "No particular procedure is provided by the statute (Art. 31B) for admitting the report into evidence nor is there any requirement that either the director or examining psychiatrist testify at the hearing."

Mastromarino v. Director, 244 Md. 645, 224 A.2d 674 (1966). As mentioned before, not only the Patuxent reports considered admissible hearsay, but they alone are sufficient to support a finding of the subject of the hearing of the defective delinquent. *Johns v. Director*, 239 Md. 411, 211 A.2d 751 (1965).

The report of the Patuxent Institution is not the only hearsay evidence which is admissible at the commitment hearing. Also admissible, are the past record of contact

with the courts, with law enforcement agencies, including records of arrests, juvenile offenses, and convictions wherein the subject had not been represented by counsel are also admissible whether or not they are included in the Patuxent report. *Walker v. Director*, 6 Md. App. 206, 258 A.2d 900 (1969); *Specht v. Director*, 243 Md. 734, 223 A.2d 263 (1966).

In the case of *Pointer v. Texas*, 380 U.S. 400 (1965), the court at page 403 stated that the Sixth Amendment right of an accused "be confronted with the witnesses against him" is a "fundamental right . . . made obligatory on the States by the Fourteenth Amendment." This Court in *Pointer, supra*, also stated "the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him." The admission of the Patuxent report into evidence, violates the spirit and the meaning of the Sixth Amendment of the United States Constitution.

Maryland Courts have once again engaged in a tyranny of labels, to uphold the denial of those basic rights mentioned above. This is done, by classifying the defective delinquent procedure "civil". However, as stated previously in *Gault, supra*, such a demonstration is meaningless; it is the potential consequences of the proceeding which determine whether basic due process protections. Certainly the potential consequence of life-time commitment cannot be distinquished from temporary confinement of juveniles. The commitment hearings under the Defective Delinquent Act whether labeled civil or criminal is very similar to that under sexual psychopathic laws. This Court has consistently held that under a typical sexual psychopathic law the hearing must afford the subject basic due process protections. *Specht v. Patterson*, 386 U.S. 605 (1967); see also: *Gerchman v. Maroney*, 355 F.2d 302 (3d Cir. 1966).

Confrontation is a trial right. Even whether the defendant has had a previous opportunity to cross-examination and has actually cross-examined a witness, it is still incum-

bent upon the State to produce that witness again, if reasonably possible. *Barber v. Page*, 390 U.S. 719 (1968); *Britton v. Maryland*, 298 F.Supp. 641 (D.M.D. 1969). As this Court stated in *Barber, supra*, at page 725:

> "The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witnesses."

In light of all of the above, it can certainly be seen that the petitioners could not possibly have been guaranteed these rights, on a piece of paper of which they were the writers, as deprived them of their liberty.

XI

THE STANDARD OF "CLEAR AND CONVINCING EVIDENCE" OR "BEYOND A REASONABLE DOUBT" SHOULD HAVE BEEN USED BY THE MARYLAND COURTS AT THE COMMITMENT PROCEEDINGS, RATHER THAN THE STANDARD OF "PREPONDERANCE OF THE EVIDENCE"

The Defective Delinquent Act does not provide a standard for determining the burden of proof that the State must meet in order to commit a person to Patuxent for an indeterminate period. The Maryland courts in applying the label "civil" have used the standard of a fair preponderance of the evidence. This is illustrated in the record by the instructions to the jury in the *Daniels* case, (J.A. 4, 465). This charge has been approved for many years by the Maryland Court of Appeals. *Crews v. Director*, 245 Md. 173, 225 A.2d 436 (1967); *Purks v. Maryland*, 226 Md. 43, 171 A.2d 726 (1961). This Court has held that the standard of proof "beyond a reasonable doubt" must be applied to determinations of delinquency in juvenile proceedings, in re *Winship*, 397 U.S. 358 (1970). This Court in that case stated that if a person accused of a crime could be adjudged guilty and imprisoned on the strength of the

same evidences that would suffice in a civil case, it would amount to a lack of fundamental fairness. Certainly, here, by the use of a label, the Maryland courts have attempted to change reality, but they can not change the fact that the petitioners have been deprived of their liberty. It is therefore contended, that the Maryland Courts will fight an unconstitutional standard in every judicial commitment made under the Act.

XII

PETITIONERS WERE UNCONSTITUTIONALLY REQUIRED TO INCRIMINATE THEMSELVES BY THE STATUTORY PROCEDURES FOR REVIEW AND REEXAMINATION OF THEIR COMMITMENTS

Section 13(b) of the Act provides that there shall be annual review and reexamination of each committed inmate by the Institution's Board of Review. If the Board of Review finds against the inmate, a written recommendation so indicating is filed with the records of the Institution. The reexamination process by the Board of Review is the only procedure for getting out of Patuxent during much of an inmate's confinement. There is only a very restrictive right to seek discharge through the Courts. The first time an inmate is eligible to petition a court is at the conclusion of two-thirds of his original sentence [Act. Sec. 10(a)]. It is interesting also to note that under Sec. 10(b) of the Act after each exercise of the power to have the Court review his status, an inmate must wait three (3) years to file another petition. Therefore, in theory at least the most available process for terminating confinement at Patuxent Institution is the annual reexamination by the Board of Review.

Suffice it to say the constitutional defects that permeate the original commitment process all survive to similarly afflict the determinations of the Board of Review. The flawed record compiled by the Institution for the purpose of committing the inmate, is its permanent file which the Board of Review has for its use.

This record of course is supplemented with entries made during the period of confinement at the Institution. The Board also receives reports about the inmates' work record and general behavior from all echelons, including his disciplinary record (J.A. 4, 278).

An inmate is powerless to present any expert evidence of his own to the Board of Review. There is also a firm Institutional policy that forbids inmates, even those with requisite financial means, from having their own psychiatrists come in and treat them. This has been justified by Dr. Kandel, the Associate Director, on the ground that this would interfere with the presentation of material to the Board of Review. Dr. Kandel indicated that if outsiders were allowed to come in and to report their findings the Board would be compelled to accept the word of outsiders without knowing what was actually happening in therapy (J.A. 4, 292-293).

The material submitted to the Board of Review by the Patuxent staff is to a very large extent the produce of compelled disclosures from the inmates (J.A. Md. 226-228, 293, 384, 454-455, 629). Noteworthy is the fact, that many of the distinguished experts who testified in the trial court concerning the soundness of an institution like Patuxent expressed concern about the breach of confidence between the therapist and the inmate. Dr. Manfred Guttmacher stated that it would be better not to have the inmate present when his psychiatrist was testifying against him (J.A. Md. 239). Dr. Jerome D. Frank, Professor of Psychiatry at Johns Hopkins University, acknowledges that there exists a problem when a therapist must testify on the question whether his patient is to get an indeterminate sentence (J.A. Md. 397).

The evidence preponderates that there is no standard or practice of respecting inmates' confidences on the date that the professional staff presents to the Board of Review. The Professional staff would surely be less chary of communicating their knowledge to the Board of Review than to

a court, since the subject is not present when the data is given and never has any opportunity to discover its content.

It is submitted that the processes employed in compiling information for the annual reviews by the Board of Review, the manner of its presentation to the Board, the absence of any semblance of notice and opportunity to be heard, and the inherent self-incriminatory practices render the proceedings before the Board of Review violative of the Constitution.

XIII

THE DISTRICT COURT AND THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED IN FINDING THAT THE MARYLAND ACT IS CONSTITUTIONAL ON ITS FACE, INTERPRETATION, APPLICATION, ADMINISTRATION AND RESULT

The Honorable R. Dorsey Watkins in his decision in *Sas et al. v. State of Maryland* (J.A. 4, 5), finds that the Maryland Defective Delinquent Statute (Art. 31 (B), Annotated Code of Maryland, 1957) is constitutional on its face. This fails to take into consideration the fact that while the face may be beautiful, yet the same may not be true for the mind and the body. Such is the case with Patuxent, a beautiful label, but nothing more.

The District Court's opinion goes on to say: "This Court feels that the *Fourth Circuit's concern* (which was not and is not shared by the writer) is fully overcome . . .", (J.A. 4, 13).

The first concern of the Fourth Circuit should have rightly been the question of whether the Maryland Act is civil or criminal in nature. This is important because the nature of the Act determines the rights, and constitutional guarantees which should be present and afforded to all the Petitioners in this case. The Court, in *Director v. Daniels*, 243 Md. 16, 221 A.2d 397 (1966), stated:

> "We further point out that the purpose of this act is so closely akin to the so-called 'sexual psychopath' laws enforced in some twenty (20) States and the District of Columbia, that the decisions of the Courts in those jurisdictions that each of their laws is civil in nature is ample authority to conclude that the Maryland Act is regulatory" (J.A. 4, 24).

In interpreting the Maryland Act regulatory and civil, the District Court and the United States Court of Appeals for the Fourth Circuit failed to consider the test which the Supreme Court has laid down in order to determine whether or not an Act is civil or criminal. The usual tests are whether the sanction involves an affirmative disability or restrain, whether its operation will promote judicial aims of punishment, retribution and occurrence, whether the behavior to which it applies is already a crime and whether it appears to be excessive in relation to the alternative purpose assigned. See: *Kennedy v. Mandosa Martineze*, 372 U.S. 144.

Certainly no one could argue that the indeterminate sentence provision of the Maryland Defective Delinquent Act does not create a total restraint that involves an affirmative disability. Nor could one argue that the Act does not promote deterrence and finally, the petitioners stringently suggest that the Act is excessive in relation to the alternative purpose assigned. It is not enough to accept the Act as civil on the basis of the Maryland Court's determination. The Federal Judiciary owed an affirmative duty to the Petitioners to have considered the various tests laid down by the Supreme Court of the United States to determine whether the Act is civil or criminal, regulatory or penal.

The lower Court went on to conclude that it would seem proper for the person who was being considered for Patuxent to be required to undergo a psychiatric examination which would not affect commitment, but might result in the Patuxent staff finding that the person was not a defective delinquent or in the alternative lead to a trial to determine, as the Court put it, not the guilt or innocence of a

crime, but the proper disposition of a person already convicted of a crime (J.A. 4, 38). This, it is contended, fails to take into consideration the language in *Specht v. Patterson*, 386 U.S. 605 (1967) where the Court in construing the Sex Offenders Act of Colorado stated as follows:

> "The Sex Offenders Act does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under the Act to determine whether a person constitutes a threat of bodily harm to the public, or is a habitual offender and mentally ill. *That is, a new finding of fact that was not an ingredient of the offense charged. The punishment under the Second Act is criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm*" 18 L.Ed.2d at 329 (Emphasis added)

With all due deference to the District Court and the Fourth Circuit, they failed to take into consideration the fact that once a person is alleged to be a defective delinquent and is incarcerated at the Patuxent Institution, he is, in fact, in the grasp of preventive detention. Preventive detention raises serious constitutional questions, questions which neither the District Court nor the Fourth Circuit not only did not reconcile, but did not find important enough to mention. The United States Court of Appeals for the District of Columbia Circuit in the case of *Cross v. Harris*, 418 F.2d 1095 (D.C. Cir. 1969), in construing the Sexual Psychopaths Act of the District of Columbia, turned its attention to the question of preventative detention as a necessary issue to be determined in construing this kind of act. The Court stated emphatically that:

> "It may be that in some circumstances preventive detention is in fact permissible. If so, such detention would have to be based on a record that clearly documented a high probability of serious harm, and circumscribed by *procedural protection, as comprehensive as those afforded criminal suspects*. Detention for any significant period of time would have

> to be attended by periodic "review as well as continuing assurance of *bona fide efforts at treatment* suited to the particular individual detained." (Emphasis added). *Id.*

Our attention was therefore, by necessity, turned to the question of whether or not the Act was civil or criminal. The United States District Court for the District of Columbia is saying, that this is immaterial, in that when preventive detention is the outcome (as in the Maryland Act, where an indeterminate sentence is involved), the individual would have to be "circumscribed by procedural protection as comprehensive as those accorded criminal suspects." This should be added to the statement of the United States Court of Appeals in *Bolton v. Harris*, 395 F.2d 642 (D.C. Cir. 1968), where the Court at page 647 states:

> "and we also included that 'while prior criminal conduct is a relevant consideration for determining the conditions of custodial care, it does not provide an automatic basis for allowing significant and arbitrary differences in such conditions.'"

By necessity, our attention is turned to the question of "bona fide efforts at treatment". This, the Petitioners contend, is not the case in their situations. Can it be a "bona fide effort at treatment", when for example, the Petitioner George Lewis Creswell had been seen by the Institutional Psychiatrist once in 1962, once in 1963, once in 1964 and five times in 1965 (Ex. 9, p. 44), and add to this the fact that the doctor conceded that each visit did not even take a couple of hours? (Ex. 9, p. 44) Can the mandate of "bona fide treatment" be squared with the Maryland Court's decision in *Shields v. Director*, 244 Md. 710, 224 A.2d 107 (1966), where the Court stated "finally, appellant's fourth contention is without merit since there is no requirement that an inmate be given treatment unless the same is appropriate." *Id.* at 109.

To hold the Maryland Act, constitutional on its face, is to disregard the constitutional questions that flow under the

surface. What possible justification can there be (and we might parenthetically note that the District Court did not see fit to pass upon this question) when the State of Maryland is segregating certain "lawbreakers" and putting them into an institution at the mercy of an indeterminate commitment, because they evidence antisocial behavior, when statistics show that 70 to 75% of the people in the penitentiary are repeaters and sociopaths (J.A. Md. 521).

The District Court found that there is no resort to punitive measures when a person referred for an examination refused to answer questions would not submit to such an examination. In the case of the Petitioner Avey, the record shows that he refused to speak to the psychiatrist (J.A. 4, 347). The record discloses that this failure could be directly related to his, or any inmates, remaining in the Patuxent Institution for an indefinite period of time (J.A. 4, 347). In this situation, the inmate of Patuxent sits under a sword of Damocles. He is like the character in the story of *The Lady and the Tiger*, he does not know which door to choose. If he speaks to his psychiatrist, he may give them reason to believe he is a defective delinquent, and if he does not speak to them, he may remain in Patuxent forever. We must add to this the problem of an inmate who wants to have his own private psychiatrist examine him.

In the situation where the inmate or candidate for Patuxent wishes to have an independent examination, he is met with Dr. Boslow's theory of Patuxent as enunciated in a letter written by the eminent doctor which is quoted in the District Court's opinion (J.A. 4, 56). The doctor states:

> "Thank you for your letter of September 24th, 1964, inquiring whether the policies of this Institution permits the treatment of inmates on a private basis by a psychiatrist not connected with the Institution.
>
> I have given the question careful consideration, and although I am myself of the view that this ought not be permitted, I submitted the question

to our Board at a recent meeting. They were also of the view that this should not be permitted."

This puts the inmate in the position of having the evaluation of a State psychiatrist on a "take it or leave it" basis. It is well known in medical science, that doctors disagree. This especially true in the area of mental health and mental illness. This would be even truer, in the case where some of the inmates may not even be mentally ill, but, are sent to Patuxent when no rational basis as shown above exists.

The District Court treats the question of the differentiation between those who commit crimes against persons then those who commit crimes against property in a somewhat cavalier manner. The Court states that "moreover, a property offense—a breach of the law—can easily lead to willingness to break another law—an offense to the person" (J.A. 4, 47). This statement would seem to say that because a person might steal a loaf of bread, he may, because stealing a loaf of bread is a crime, commit murder. This is ludicrous to say the least. It bysteps the question of crimes against persons versus crimes against property; a topic that was specifically brought up by the *Blue Ribbon Committee* of December 17th, 1964 (J.A. 4, 509), where it was indicated that a delineation should be made between individuals who have committed offenses against property versus those who have committed offenses against persons.

While the District Court and the United States Court of Appeals for the Fourth Circuit may hold that the Maryland Act is constitutional on its face (J.A. 4, 58), the Petitioners submit that the body is in dire need of surgery.

CONCLUSION

The Patuxent Institution is neither a prison, a hospital nor an insane asylum. Yet the fact remains that one is, indeed, imprisoned. The act of incarceration under the Act is capable of changing in form, depending upon the attack upon it. The defective delinquent attempting to assert rights and protections afforded all citizens by the Constitution of the United States can be fairly compared to Odysseus confronted with Proteus; when the defective delinquent escapes, Patuxent is a prison; when he complains of indeterminate confinement, possibly even in a penitentiary without maximum or minimum limitations, Patuxent is a hospital or an insane asylum; or the Act is analogized to habitual criminal offender law. When the defective delinquent requests those protections surrounding criminal prosecutions and imprisonment, the Act is civil; when the delinquent complains of cruel and unusual punishment, he is told that he is being treated though the Maryland Court has held treatment is not required. When the defective delinquent offers evidence at a determination or redetermination hearing regarding treatment, he finally learns that the issue is not relevant, and that he is truly confined for the protection of society.

Accordingly, this Court should direct the District Court to issue the Writs after finding that the Petitioners have been confined in an institution which grants no treatment and whose commitment procedures are patently not Constitutional. Alternatively, this Court should grant the Legislature of Maryland a brief period of time to formulate appropriate procedures consistent with the principles of due process to include (1) a more objective definition susceptible of measurement and understanding; (2) the right to counsel beginning with the examination order stage and to confront witnesses, not only at the introductory stage, but also at redetermination and Board of review hearings; the right of medical assistance at the adjudicatory stage in the institution prior to the institution's findings; (3) the providing of appropriate standards for the introduction of evidence

and burdens of proof; (4) the granting to the suspected defective delinquent of the absolute right of appeal, and (5) the insuring that the institution has the capabilities of giving treatment and that committed defective delinquents are susceptible to treatment, and, in fact, duly receive appropriate and proper medical treatment.

Respectfully,

KARL G. FEISSNER
WILLIAM L. KAPLAN
THOMAS P. SMITH
FRED R. JOSEPH
ANDREW E. GREENWALD
WALTER B. LAAKE, JR.
Attorneys for Appellants
FEISSNER, KAPLAN & SMITH
6401 New Hampshire Avenue
Hyattsville, Maryland 20783
270-2626

APPENDIX A

ARTICLE 31B
DEFECTIVE DELINQUENTS

* * * * *

PATUXENT INSTITUTION

§ 1. Established; board of Patuxent Institution.

(a) *Institution established.*—There shall be an institution for defective deliquents, with the powers and duties as provided in this article or elsewhere in the laws of this State. Said institution shall be established at Jessups and shall be known as the Patuxent Institution.

(b) *Board of Patuxent Institution—Powers generally; membership; appointment; terms; vacancy; removal of members; compensation.*—The board of Patuxent Institution shall possess all of the powers bestowed by law upon Patuxent Institution and shall consist of the chairman of the board and four associate members, who shall be appointed by the Governor with the advice and consent of the Senate. Two of the associate members shall be appointed from the membership of the advisory board of Patuxent Institution, and one of these two associate members shall be a psychiatrist. The chairman and associate members of the board shall serve terms of four years, except that the initial term of the associate members first appointed to the board shall be one, two, three and four years respectively. Any vacancy in the board shall be filled by appointment of the Governor, with advice and consent of the Senate, for the unexpired term. The Governor may remove any member of the board for inefficiency, neglect of duty, or misconduct in office, giving to such member a copy of the charges preferred and the opportunity of being first publicly heard in person or by counsel. If such member shall be removed, the Governor shall file in the office of the Secretary of State a complete statement of all charges made against such member,

and his finding thereof, together with a complete record of the proceedings. The chairman and associate members shall serve without pay.

(c) *Same—Oath; certificate of appointment.*—Before entering upon the discharge of the duties of his office, each member of said board shall take an oath that he will well and faithfully execute and perform all and singular the duties appertaining to his office according to the laws of the State and the rules and regulations adopted in accordance therewith. The certificate of the appointment by the Governor of any member shall be sent to the clerk of the circuit court of the county or the clerk of the Superior Court of Baltimore City, as the case may be, where the appointee of the receipt of such certificate warning him that failure to take the aforesaid oath within sixty (60) days shall constitute a refusal of the appointment. The clerk shall notify the Governor of any such failure.

(d) *Same—Quorum; execution of papers.*—A majority of siad board shall be a quorum for the transaction of all business, and shall have full power and authority to do and perform any and all acts that the said board is by law authorized and empowered to do and perform; and the said board, or a majority thereof, may authorize any of its members by and in its name to execute on its behalf any and all papers that the said board has power and authority to execute.

(e) *Same—Incidental powers; witnesses.*—The board of Patuxent Institution shall have any and all incidental powers and authority appropriate and convenient to enable the said board to fully discharge the powers of management, control and supervision conferred upon them by this article. Said board shall have power to summon witnesses before it and to administer oaths or affirmations to such witnesses whenever, in the judgment of the board, it may be necessary for the effectual discharge of its duties under this article; and any person failing to appear before the board at the time and place specified in answer to said summons, or refusing to testify, shall be punishable by a fine of not less than

twenty-five nor more than fifty dollars; false swearing on the part of any such witness shall be deemed perjury, and shall be punished as such.

(f) *Same–Rules and regulations.*–Said board shall have full power and authority to make, repeal or amend such rules and regulations, not inconsistent with law or applicable rules and regulations of other State agencies, for the operation, discipline and conduct of the Institution, the inmates, staff and employees, by this article placed under its supervision or control, as may be necessary or convenient for the proper administration of hte power and discretion conferred upon it by this article.

(g) *Same–Interest in contracts; rewards or gifts.*–(1) No member of said board, or the advisory board hereinafter created, or any officer, member of the staff or employee of Patuxent Institution shall be directly or indirectly concerned or interested in any contract, purchase or sale made, on the recommendation of said board, or shall accept any reward or gift or any promise of any reward or gift directly or indirectly from any person interested in any contract, purchase or sale made on the recommendation of said board and every officer, member of the staff or employee of Patuxent Institution shall make report to said board of all such offenses coming to his knowledge.

(2) No member of said board, or of the advisory board hereinafter created, or any officer, member of the staff or employee of Patuxent Institution, shall accept any reward or gift, or any promise of reward or gift, from any inmate in said Institution, or from anyone on his behalf, or shall receive any devise or bequest, or any promise of devise or bequest, from any such inmate, or from any person on his behalf, or shall enter into any contract with such inmate, or with any person on his behalf. All such gifts, rewards, bequests, devises, promises and contracts shall be void.

(3) Any violation of the provisions of this subsection shall be sufficient cause, in the case of a member of said board or officer of Patuxent Institution, for removal from

office, and in the case of any other employee of the Institution for his dismissal. (An. Code, 1951, §1; 1951, ch. 476, §1; 1961, ch. 629, §1; 1962, ch. 16.)

§2. Director.

The director shall be the chief administrative officer of the Patuxent Institution, and shall be a trained, able and competent psychiatrist with at least five years' experience in the practice or teaching of psychiatry. The director holding office at the time of the passage of this section shall continue to hold office in accordance with the provisions of this section. Any successor as director shall be appointed by the Governor from a nominee or nominees proposed to the Governor by a special committee composed of the professor of psychiatry of the Medical School of the University of Maryland, the professor of psychiatry of the Medical School of the Johns Hopkins University, the chairman of the Board of Correction, and the chairman of the board of Patuxent Institution. Three members of said special committee shall be empowered in the absence of the full committee to act for the committee. The director shall receive a salary as fixed in the budget, which shall not be less than fifteen thousand dollars ($15,000.00) annually. Any director so appointed shall hold his position on probation for the first six months after assuming his duties therein and during that time shall be subject to removal by the Governor. Thereafter, he shall hold his office during good behavior, and shall be subject to removal only after charges have been preferred against him to the Governor. The director shall be notified of such charges and given a copy of them in due time to prepare an answer thereto; he shall if he so requests be heard in person or by counsel and may be removed only by direction of the Governor after such hearing. (An. Code, 1951, §2; 1951, ch. 476, §2; 1961, ch. 629, §1.)

§3. Officers and employees.

(a) *Enumeration, qualifications, duties and salaries.*—There shall be three associate directors of the said Institution. Two of said associates shall be trained, able and competent psychiatrists of at least three years' experience in the practice or teaching of psychiatry and shall assist primarily in the psychiatric and related duties of the Institution. The third of said associates shall be particularly charged, under the director, with the custodial duties of the Institution. There shall also be in the Institution at least three psychiatrists or clinical psychologists, at least four trained social workers (one of whom shall be a psychiatric social worker), a resident physician and a resident dentist, together with such other psychiatrists, psychologists, social service workers and sociologists, physicians, administrative officers, custodians, clerks and other officers and employees as may be provided in the budget from time to time. Except as otherwise provided herein, the salaries of all officers and employees in the Institution shall be as provided in the budget.

(b) *Professional positions not included in merit system; manner of appointment.*—Persons in professional positions in the said Institution, including the associate directors and all social workers and sociologists, psychiatrists, psychologists, physicians and dentists shall be appointed by the director, subject to the approval of the board of Patuxent Institution, and shall not be included in the merit system under the provisions of Article 64A of the Annotated Code. (An. Code, 1951, §3; 1951, ch. 476, §1957, ch. 762; 1961, ch. 629, §1.)

§4. Advisory board; surgical operations.

(a) *Advisory board for defective delinquents.*—The advisory board for defective delinquents is hereby established. It shall consist of the professor of psychiatry in the Medical School of the University of Maryland, or someone designated by him; the professor of psychiatry at the Johns Hopkins University Medical School, or someone designated

by him; two competent sociologists from the University of Maryland and the Johns Hopkins University, one each to be appointed by the respective presidents of these two institutions; the full-time professor of constitutional law at the University of Maryland School of Law, or if there be no such full-time professor, or if he is unable to serve, such other full-time professor of the University of Maryland School of Law as may be designated by the dean of said school; the Director of Parole and Probation; and two practicing members of the Maryland bar, with at least five years' experience in the trial of civil and/or criminal cases, appointed by the Governor to serve for a five-year term each. The advisory board shall organize by electing a chairman, and shall meet on the call of the chairman at least once in every three months. One of the members of the said board shall serve as secretary upon designation by the chairman and shall keep full and accurate minutes of such meetings and preserve the same. The members of the advisory board shall receive a per diem payment for every day spent in the duties of the board. The advisory board shall confer with the staff of the Institution, and with the board from time to time, and shall give to the Institution a general consultative and advisory service on problems and matters relating to its work.

(b) *Authority to perform surgical operation required.*— No surgical operation shall be performed as treatment of any defective delinquent except as authorized by the approval of the advisory board and also by the written consent of the defective delinquent, his nearest relative, or the order of the court. (An. Code, 1951, §4; 1951, ch. 476, §4; 1957, chs. 558, 762; 1961, ch. 629, §1.)

DEFECTIVE DELINQUENTS

§5. Defined.

For the purposes of this article, a defective delinquent shall be defined as an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such donfinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment. (An. Code, 1951, §5; 1951, ch. 476, §5; 1957, ch. 558; 1961, ch. 629, §1.)

§6. Requests for examination.

(a) *For whom requests may be made.*—A request may be made that a person be examined for possible defective delinquency if he has been convicted and sentenced in a court of this State for a crime or offense committed on or after June 1, 1954, coming under one or more of the following categories; (1) A felony; (2) a misdemeanor punishable by imprisonment in the penitentiary; (3) a crime of violence; (4) a sex crime involving: (A) Physical force or violence, (B) disparity of age between an adult and a minor, or (C) a sexual act of an uncontrolled and/or repetitive nature; (5) two or more convictions for any offenses or crimes punishable by imprisonment, in a criminal court of this State. A person convicted and sentenced for a crime or offense within one of the categories listed above in this subsection, except that such crime or offense was committed after June 1, 1954, if after said date such person is adjudged to have broken the terms of any parole or probation on which he has been released from said sentence.

(b) *Who may make requests.*—The request for such examination may be made by the Department of Correction or by the State's attorney or assistant State's attorney who prosecuted the person for a crime or offense specified here-

inabove in this section, on any knowledge or suspicion of the presence of defective delinquency in such person. Such person himself, or his attorney in his behalf, may make such a request of the court. Whenever a request for examination comes from any such source the court may order such a person to be examined by the institution for defective delinquents to ascertain if he or she is a defective delinquent. The court also may make such an order on its own initiative. A copy of any order for examination shall be served upon the person to be examined.

(c) *When requests may be made.*—Such an examination may be requested and made at any time after the person has been convicted and sentenced for a crime or offense specified hereinabove in this section, provided that the said person has been sentenced to a period of confinement in a penal institution or is then serving such a sentence. No such examination shall be ordered or made if the said person has been released from confinement for the particular crime or offense of which he was convicted.

(d) *How requests made.*—The request for such an examination shall be by petition filed with the court having custody of or jurisdiction over the said person, stating therein the reasons for *suspecting* or *supposing* the presence of defective delinquency in the said person. The court in ordering such examination shall do so by formal written order directed to Patuxent Institution. When the person to be examined is in the custody of the Department of Correction, such order shall also be directed to the Department of Correction, which shall forthwith cause the transfer of the person to the custody of Patuxent Institution.

(e) *Custody after examination ordered; jurisdiction of defendant.*—After the court has ordered an examination to be made under this section, said person shall be retained in custody, initially of the Department of Correction until his transfer to Patuxent Institution and thereafter in the custody of Patuxent Institution, until such time as the procedures of this subtitle for the determination of whether or

not said person is a defective delinquent have been completed, without regard to whether or not the criminal sentence to which he was last sentenced has expired. The court which last sentenced the defendant, whether or not the term of court in which he was sentenced has expired shall retain jurisdiction of the defendant for the purpose of any of the procedures specified in §§ 6, 7, 8 or 9 hereof, except that the Criminal Court of Baltimore City shall for such purpose have jurisdiction of a person last sentenced by the Municipal Court of Baltimore City. (An. Code, 1951, § 6; 1951, ch. 476, § 6; 1957, ch. 558; 1960, ch. 43, § 3; 1961, ch. 629, § 1; 1963, ch. 283.)

§ 7. Examinations.

(a) *By whom made; report of findings to court; time spent in institution, etc., credited on sentence.*—Any such examination shall be made by at least three persons on behalf of the institution for defective delinquents, one of whom shall be a medical physician, one a psychiatrist, and one a psychologist. They shall assemble all pertinent information about the person to be examined, before proceeding therewith, including a complete statement of the crime for which he has been sentenced, the circumstances of such crime, the court in which he was sentenced, the nature of the sentence, copies of any probation or other reports which may have been made about him, and reports as to his social, physical, mental and psychiatric condition and history. On the basis of all the assembled information, plus their own personal examination and study of the said person, they shall determine whether in their opinion, or in the opinion of a majority of them, the said person is or is not a defective delinquent. They shall state their findings in a written report addressed to the court, no later than six months from the date said person was received in the Institution for examination, or before expiration of his sentence, whichever last occurs. If the substance of the report is that the said person is not a defective delinquent, he shall be retained in the costody of the Department of Correction under his original sentence as if he had not bee examined for pos-

sible defective delinquency. Provided, however, that the said person shall be returned to the custody of the Department of Correction with full credit for such time as he has already spent in the institution for defective delinquents or within the custody of the Department of Correction including such allowances (or disallowances) relating to good behavior and/or work performed as the Board of Correction may determine under the provisions of § 688 of Article 27 of the Code.

(b) *Additional examinations by psychiatrists in certain cases.*—In addition to the examination provided in the foregoing subparagraph (a), whenever a request has been made to examine any person for defective delinquency, other than a request made by such person himself or by his attorney on his behalf, and whenever the court has on its own initiative ordered examination of any person, then such person shall be entitled, upon request, to be examined by a practitioner of psychiatry of his own choice for the purpose of determining whether he is a defective delinquent within the terms of this article; and the reasonable costs of such examination shall be defrayed by the State of Maryland from the appropriations to the judiciary, in such amount as may be approved by the court. The report of examination made by such psychiatrist shall be submitted in writing addressed to the court. (An. Code, 1951, § 7; 1951, ch. 476, § 7; 1957, chs. 558, 762; 1961, ch. 629, § 1; 1963, ch. 283.)

§ 8. Hearings.

(a) *When required; defendant to be advised of right to counsel.*—If the institution for defective delinquents in its report on any person shall state that he is a defective delinquent, the court shall forthwith summon the person before it and advise him of the substance of the report and of the pendency of the hearing hereinafter provided; the court shall further advise him of his right to be represented at said hearing by counsel of his choice, or if he has no choice, by competent counsel appointed by the court.

(b) *Appointment and rights of counsel.*—Unless appearance of counsel chosen by the person is entered within twenty days following the proceeding set forth in subsection (a) hereof, the court shall appoint counsel to represent the person. Counsel for the person and for the State shall have access to all records, reports and papers of the institution relating to the person, and to all papers, in the possession of the court bearing upon the person's case, including a copy of the report of the institution.

(c) *When hearing held; jury.*—The hearing for determination of defective delinquency shall be held no less than thirty days following designation of counsel, unless acceleration of the time is requested by the person or his counsel. Upon the application of the State or of the person for a jury trial, or upon its own motion, the court shall empanel a jury of twelve persons to be selected by the court from the jurors then in attendance upon said court; or if the court is in recess, the jurors shall be selected from those in attendance at the term of court at which said petition is heard. The court shall direct such jury after hearing to find specially, by its verdict, whether the person is a defective delinquent as defined in §5. In the absence of request for finding by a jury, the court may make such determination sitting as judge and jury. (An. Code, 1951, §8; 1951, ch. 476, §8; 1957, ch. 762; 1960, ch. 43, §3; 1961, ch. 629, §1; 1963, ch. 283.)

§9. Sentence.

(a) *When defendant found not to be a defective delinquent.*—If the court or the jury, as the case may be, shall find and determine that the said defendant is not a defective delinquent, the court shall order him returned to the custody of the Department of Correction, and he shall begin or resume his period of confinement on said convictions as if he had not been examined for possible defective delinquency. Provided, however, that the said defendant shall be returned to custody under his original sentence with full credit for such time as he has already spent in the institu-

tion for defective delinquents or within the costody of the Department of Correction including such allowances (or disallowances) relating to good behavior and&or work performed as the Board of Correction may determine under the provisions of §688 of Article 27 of the Code.

(b) *When defendant found to be a defective delinquent.*—If the court or the jury, as the case may be, shall find and determine that the said defendant is a defective delinquent, the court shall so inform the defendant, and shall order him to be committed or returned to the institution for confinement as a defective delinquent, for an indeterminate period without either maximum or minimum limits. In such event, the sentence for the original criminal conviction, or any unexpired portion thereof, shall be and remain suspended, and the defendant shall no longer be confined for any portion of said original sentence, except as otherwise provided herein. Instead, the defendant shall thenceforth remain in the custody of the institution for defective delinquents, subject to the provisions of this article. (An. Code, 1951, §9; 1951, ch. 476, §9; 1957, ch. 762; 1961, ch. 629, §1.)

§10. Petition for review.

(a) *Who may file; hearing and determination.*—After any person shall have been committed under §9(b) as a defective delinquent, shall have been confined for two years after such commitment, and shall have been confined for a total period, including any period of confinement under his original sentence prior to commitment under §9(b), equal to two thirds of his original sentence, such person or anyone in his behalf, including the direcotr or any officer or employee of Patuxent Institution, may file a petition requesting that such person be brought before the court in which such petition is filed for the purpose of having the defective delinquency of such person redetermined. Such a petition may be filed in the law courts of the county of Baltimore City, as the case may be, either where such person was originally sentenced or which was the bona fide residence of such

person when originally sentenced. The court shall forthwith proceed to hear and determine the matter. If the person so confined, or anyone in his behalf, shall pray a jury trial, the court shall empanel a jury of twelve persons to be selected by the court from the jurors then in attendance upon said court; or if the court is in recess, the jurors shall be selected from those in attendance at the term of court at which said petition is heard. Any party in interest shall have the right to counsel and to process to compel the attendance of witnesses. If the court or jury, as the case may be, shall determine that such person is a defective delinquent, the court shall order said person recommitted to the institution from which he immediately came; otherwise he shall be discharged from such confinement and custody, or in the discretion of the court committed under his original sentence, less such time as he has already served in the institution for defective delinquents or within the custody of the Board of Correction, including such allowances (or disallowances) relating to good behavior and/or work performed as the Board of Correction may determine under the provisions of § 688 of Article 27 of the Code which shall apply to such person's period of confinement to Patuxent Institution with any variation of the regulations issued under said section as the Board of Correction shall consider appropriate in the particular case.

(b) *Application for further review not to be made within three years.*—After the right to apply for any such petition for review under the provisions of this section shall have been exercised once, it shall not again be sought under the provisions of this section within less than three years following the prior seeking of a petition for review from confinement under the same commitment.

(c) *Right to petition for habeas corpus not affected.*—The right to review specified in this section shall not be construed to deprive the defendant of his right to petition for habeas corpus as it might otherwise exist. (An. Code, 1951, § 10; 1951, ch. 476, § 10; 1957, chs. 378, 762, 1961, ch. 629, § 1.)

§11. Appeal.

From any court order issued under the provisions of §9, or of §10, within thirty (30) days after the passage of the order, application may be made to the Court of Special Appeals for leave to appeal from the order. The application for leave to appeal shall be in such form as the Court of Special Appeals may, by its rules, prescribe. If the Attorney General or the State's attorney shall state an intention to file an application for leave to appeal, the order may be stayed. If the application for leave to appeal is granted, the procedure for appeal shall conform with the rules of the Court of Special Appeals. On appeal, the Court may affirm, reverse or modify the order appealed, or it may remand the case for further proceedings. If the application for leave to appeal is denied, the order sought to be reviewed shall become final. (An. Code, 1951, §11; 1951, ch. 476, §11; 1957, ch. 558; 1960, ch. 43, §3; 1961, ch. 629, §1; 1966, ch. 12, §5.)

§11A. Same—Poverty of defendant.

Whenever a defendant desires to file an application for leave to appeal in order to appeal as provided in §11, and is unable by reason of poverty to pay the cost of the application and of appeal, he may file, with the court making the order from whcih appeal is sought, a petition under oath alleging the fact of his proverty and his inability to defray the expense of making application and of appealing. the court upon being satisfied of the defendant's poverty shall sign an order directing that all costs, including but not limited to, all court costs, the cost of preparing the transcript of testimony, the cost of preparing and transmitting the record, and the cost of the briefs, appendices and printed record extract necessary in connection with the appeal shall be paid by the political subdivision from which the appeal is taken and that the record shall be transmitted to the Court of Special Appeals at the expense of the political subdivision. A copy of the order shall be included in the record transmitted to the Court of Special Appeals and

the payment of all filing fees to the Clerk of the Court of Special Appeals in connection with the appeal are waived. If counsel prosecuting the appeal on behalf of the defendant has been appointed as such counsel by the court making the order appealed from or by the Court of Special Appeals, the Court of Special Appeals may allow him a fee in an amount which the Court shall think proper for his services in the appeal, the fee to be paid by the political subdivision. (1960, ch. 43, § 3; 1961, ch. 629, § 1966, ch. 12, § 5.)

INSTITUTIONAL BOARD OF REVIEW

§ 12. Composition; quorum; vacancy.

The institutional board of review shall consist of the director, the three associate directors, the professor of the University of Maryland School of Law who is a member of the advisory board, the member of the Maryland bar, who of the two who are members of the advisory board has served thereon the longer, and a sociologist to be appointed by the board of Patuxent Institution from the faculty of an accredited institution of higher education in Maryland. Four members, including either the professor of law, the member of the bar, or both of them, shall constitute a quorum. The board of Patuxent Institution if the position of director is vacant, or the director if a position of associate director is vacant, shall appoint from the staff of the Institution a substitute member of the institutional board of review or serve during the vacancy. (An. Code, 1951, § 12; 1951, ch. 476, § 12; 1961, ch. 629, § 1.)

§ 13. Duties.

(a) *Part of regular duties in Institution.*—The members of the institutional board of review and such other members of the staff whom the director shall designate to attend with the said board as advisors shall serve in such capacity as part of their regular work and duties in the Institution.

(b) *Review and reexamination of defective delinquents.*—The institutional board of review shall review and thoroughly reexamine every person held in custodial care as a defective delinquent, not less frequently than once in every calendar year. Such review and reexamination shall be to determine whether such person shall remain classified as a defective delinquent, and in making such determination the board assemble such information, use such tests and follow such procedures as then are being utilized in the first instance by the institution for defective delinquents to indicate the presence of defective delinquency. The board shall make a recommendation for the future status and treatment of each person so reviewed and reexamined, in writing, and a copy of every such recommendation shall be filed with the records of the Institution.

(c) *Recommendation that defective delinquent remain so classified.*—If the institutional board of review in its review and reexamination of any person shall ascertain that he shoudl remain classified as a defective delinquent and receive further treatment as such; it shall so state in its written recommendation filed with the Institution.

(d) *Leave of absence or parole from Instituttion.*—If the institutional board of review as a result of its review and reexamination of any person believes that it may be for his benefit and for the benefit of society to grant him a leave of absence or parole from the institution for defective delinquents, it may proceed to arrange for such leave or parole. Any leave of absence or parole shall be granted for a period not to exceed one year. The board shall review the case before the expiration of that time and may review it at any time during the year, in order to make further or alternate determination. The board may attach to any such leave of absence or praole such conditions as to it seem wise or necessary, including arrangements for the care and supervision of the person granted a leave or parole, by his friends or elatives, by the institution for defective delinquents or by the Department of Parole and Probation, and also includ-

ing as a condition that the said person shall be steadily employed or otherwise occupied during the time of such leave or parole. The board may at any time revoke a leave or parole, or change the conditions and arrangements therefor. The board may also request the court which imposed upon the person the original sentence resulting in his being subsequently classified as a defective delinquent, to reinstate the said original sentence; and the said court is authorized and empowered following such a request to reinstate and reimpose the said original sentence, and to cause the said person to be held in custody therefor, as provided hereinbelow.

(e) *Employment outside of Institution; collection and disbursement of earnings.*—The leave of absence that may be granted by the institutional board of review may be limited to hours during which a person is suitably employed outside the Institution on such terms as are deemed fair and reasonable by the said board. The earnings from such employment shall be collected by the said board, and from them the said board shall pay to the Institution an amount deemed reasonable by the said board in the particular case for such person's board, lodging, supervision and treatment, shall pay to such person or on his behalf amounts necessary for his travel and other proper expenses outside the Institution, and shall accumulate the remainder in a fund held for such person's benefit. If such person is later granted parole or leave of absence not limited to hours of employment the board may pay him from such fund amounts deemed necessary and proper by the board, and upon such person's unconditional release from custody, or upon his death, the board shall pay the entire remaining fund to him or his estate. If said person is later transferred to the custody of the Department of Correction, any such fund shall be transferred to the Department of Correction to be held in a separate account for said person, and shall be subject to applicable rules for the disbursement thereof as are established by the Board of Correction. While any such fund is held the board shall pay from its amounts directed to be

paid by order of court for the support of such person's dependents, but the fund shall otherwise be exempt from attachment, levy, or lien, and any contract or agreement whereby such person shall purport to waive such exemptions shall be void.

(f) *When court to release from custody of Institution or grant leave of absence or parole.*—If the institutional board of review as a result of its review and reexamination of any person believes that he has sufficiently improved to warrant his unconditional release from custody as a defective delinquent, it shall so inform whatever court has jurisdiction over the person. The court then shall make such further study of such person as seems necessary, and may at its discretion summon such person before it for a further hearing, together with any witnesses whose testimony may be pertinent and together with any relevant documents or other evidence. On the basis of such reports, study and possible hearing, the court shall determine whether the person before it shall be released unconditionally from custody as a defective delinquent, released conditionally on a leave of absence or parole, returned to the custody of the Institution as a defective delinquent, or returned to the Department of Correction, to serve the original sentence upon which he was committed prior to being classified as a defective delinquent. Upon return of a person to the custody of the Department of Correction there shall be deducted from the original sentence all time spent in the custody of Patuxent Institution and in the custody of the Department of Correction. The Department shall make such allowances or (disallowances) relating to good behavior and/or work performed as the Board of Correction may determine under the provisions of §688 of Article 27 of the Code, Patuxent Institution shall furnish the Department of Correction with such information from the records of such person's period of confinement in the Institution as the Board of Correction shall reasonably require for determining the application of the said §688, which shall apply to such person's period of commitment to Patuxent Institution with any variation of

the regulations issued under said section as the Board of Correction shall consider appropriate in the particular case. The power of the court to provide for a leave of absence or parole for any such person before it shall be the same as that of the institutional board of review, described hereinabove in this section, except that once the person has entered upon the leave of absence or parole, the board shall have the administration of the terms and conditions of the leave or parole as set by the court. If the person before the court is returned to the custody of the Institution as a defective delinquent, it shall continue to be for an indefinite period, without either maximum or minimum limits, subject to the review and reexamination by the institutional board of review, as provided hereinabove in this section. (An. Code, 1951, § 13; 1951, ch. 476, § 13; 1957, ch. 762; 1961, ch. 629, § 1.)

SUPPLEMENT

ARTICLE 31B

DEFECTIVE DELINQUENTS

§ 3. Officers and employees.

(a) *Enumeration, qualifications, duties and salaries.*—There shall be three associate directors of the said Institution. One of said associates shall be a trained, able, and competent psychiatrist of at least three years' experience in the practice or teaching of psychiatry; and one of said associates shall be a trained, able, and competent behavioral scientist of at least three years' experience in the practice or teaching of his speciality; and said associates shall assist primarily in the diagnostic and treatment duties of the Institution. The third of said associates shall be particularly charged, under the director, with the custodial duties of the Institution. There shall also be in the Institution at least three psychiatrists or clinical psychologists, at least four trained social workers (one of whom shall be a psychiatric social worker), a physician, and a dentist, together with such other psychiatrists, psychologists, social service workers and sociologists, physicians, administrative officers, custodians, clerks, and other officers and employees as may be provided in the budget from time to time. Except as otherwise provided herein, the salaries of all officers and employees in the insitution shall be as provided in the budget. (1969, ch. 115.)

§ 6. Requests for examination.

(e) *Custody after examination ordered; jurisdiction of defendant.*—After the court has ordered an examination to be made under this section, said person shall be retained in custody, initially of the Department of Correction until his transfer to Patuxent Institution and thereafter in the custody of Patuxent Institution, until such time as the procedures of this subtitle for the determination of whether or not said person is a defective delinquent have been completed, with-

out regard to whether or not the criminal sentence to which he was last sentenced has expired. The court which last sentenced the defendant, whether or not the term of court in which he was sentenced has expired shall retain jurisdiction of the defendant for the purpose of any of the procedures specified in §§ 6, 7, 8 or 9 hereof, except that the Criminal Court of Baltimore City and the Circuit Court of Anne Arundel County shall for such purpose have jurisdiction of a person last sentenced by the Municipal Court of Baltimore City and the People's Court of Anne Arundel County, respectively. (1967, ch. 348.)

INSTITUTIONAL BOARD OF REVIEW

§ 12. Composition; quorum.

The institutional board of review shall consist of the director, the three associate directors, the professor of the University of Maryland School of Law who is a member of the advisory board, either of the members of the Maryland bar who are members of the advisory board and a sociologist to be appointed by the board of Patuxent Institution from the faculty of an accredited institution of higher education in Maryland. Four members, including either the professor of law or one of the members of the bar who is a member of the advisory board shall constitute a quorum. (An. Code, 1951, § 12; 1951, ch. 476, § 12; 1961, ch. 629, § 1; 1968, ch. 144.)

§ 14. Not to affect juvenile courts; adults convicted in juvenile courts.

Nothing in this article shall be construed to extend to or affect any case in a juvenile court or in the court of a magistrate for juvenile causes, or any person involved in such case, unless the juvenile court judge shall have waived jurisdiction in the case so that it may be heard and adjudicated in a regular criminal court. Provided, however, that the provisions of this article shall apply to any adult who has been found guilty and sentenced by one of the several juvenile

courts in this State when said juvenile court is exercising its original jurisdiction as provided in §§53 and 55 of Article 26 of the Annotated Code of Maryland. (An. Code, 1951, §14; 1951, ch. 476, §14; 1959, ch. 643; 1961, ch. 629, §1.)

§ 15. Not to affect magistrate courts; Baltimore City.

Nothing in this article shall be construed to extend to or affect any case in the court of a magistrate or justice of the peace, or any person involved in such case, unless by reason of a request for a jury trial or for other cause the case shall be heard and adjudicated in a regular criminal court. Provided, however, that the Criminal Court of Baltimore City shall have jurisdiction of a person convicted and sentenced by the Municipal Court of Baltimore City if the crime, offense, crimes or offenses, for which he has been convicted and sentenced are within one or more of the categories listed in §6 of this article. (An. Code, 1951, §15; 1951, ch. 476, §15; 1961, ch. 629, §1.)

ADMINISTRATIVE PROVISIONS

§ 16. Certain transfers between institutions.

(a) *Person sentenced for offense committed prior to June 1, 1954.*—Any person imprisoned on a sentence for a crime or offense committed before June 1, 1954, may, by agreement between the Department of Correction and Patuxent Institution and without court proceedings, be transferred to Patuxent Institution for examination as a possible defective delinquent and, if so diagnosed, may be similar agreement be detained there for the duration of his sentence or any part thereof.

(b) *Transfer to Institution for employment.*—Any person in the custody of the Department of Correction may be transferred to Patuxent Institution for employment there by agreement between the Institution and the Department of Correction.

(c) *Diminution of sentence.*—The sentence of any person transferred to Patuxent Institution under the provisions of this section shall be subject to the same diminution for behavior, work and training as though said person had remained in the custody of the Department of Correction.

(d) *Transfer from Institution for employment, treatment or imprisonment.*—Any person in the custody of Patuxent Institution may be transferred, by agreement between the Institution and the Department of Correction, to the custody of the Department of Correction for employment on a prison farm or in any work project or for hospitalization or for other treatment for illness or for imprisonment; provided, however, that except in cases of transfer for hospitalization or treatment for illness it shall first be found by the institutional board of review that such transfer will not reduce or retard the prospect of such person's release from confinement as a defective delinquent, and provided further that such person, notwithstanding transfer, shall remain committed to Patuxent Institution and shall be returned there at least annually for reexamination by the institutional board of review. (An. Code, 1951, § 16; 1951, ch. 476, § 16; 1953, ch. 516; 1955, ch. 244; 1961, ch. 629, § 1.)

§ 17. Supplying goods, wares, merchandise and produce to "consuming institutions."

The board of Patuxent Institution is hereby empowered to determine from time to time whether, and to what extent, persons in the custody of said Institution and selected by its director, shall supply goods, wares, merchandise and produce required to be purchased by "consuming institutions" as defined in Article 27, § 680 of the Annotated Code of Maryland. (1961, ch. 629, § 1)

§ 18. Record of inmate.

(a) *Description recorded; photograph; Bertillon method.*—Said Institution shall record or cause to be recorded a description of every person committed to it as a defective

shall attach thereto as part of said record a photograph or photographs of such person. For the purpose of obtaining accurate descriptions of such persons, the director is hereby authorized to adopt the Bertillon method of measurement and registration or such other method as shall be adequately descriptive.

(b) *Criminal history forwarded by State's attorney.*—In order to accomplish the purposes of subsection (a), the State's attorney of any county or city, in which any person has been found to be a defective delinquent, is hereby direction to forward promptly to said Institution and upon blanks furnished by it, a criminal history of such person as fully as the same is known or can be ascertained by such State's attorney.

(c) *Accessibility of record; admissible in evidence.*—The record herein provided for shall not be made public except as may be necessary in the identification or trial of persons accused of crime and except as provided in this section. The record shall be accessible, however, to any officer of any court having criminal jurisdiction in this State, upon the order of the judge of said court, or of the State's attorney, which said order shall be attested by the seal of the court. Whenever, in the trial of any person, the fact of previous conviction of any person for any crime may be admissible, any such record shall be admissible in evidence for the purposes of proving the fact of the conviction and the crime for which such defective delinquent was convicted.

(d) *Copy to warden or other officer in reciprocal state.*—A copy of such record shall be furnished, upon request, to any warden or other officer in charge of a prison for felons in any other state of the United States; provided that such state has made reciprocal provisions by law for furnishing records of its convicted criminals to the authorities of this State.

(e) *Copy to police officer upon signed order.*—Said Institution shall furnish a copy of such record of any defective delinquent to any police officer presenting an order for such

copy signed by the officer in charge of police of any county or municipality.

(f) *Trial data forwarded by clerk; fee.*—Whenever a person shall be convicted of crime and committed to the said Institution, the clerk of the court involved shall, unless advised by said Institution that records are available from the Department of Correction, make and forward as soon as practicable, but not later than thirty days from time of commitment, to said Institution, a record containing, with regard to the criminal trial, a short copy of the docket entries, the name and address of the judge presiding at the trial, the State's attorney and sheriff, and the names and addresses of the jurors and the names of the witnesses sworn on the trial, together with a statement of any facts which the presiding judge may deem important or necessary for a full comprehension of the case. In each case in which he shall perform the duties required by this section, the clerk of the court shall be entitled to one dollar as compensation, which shall be taxed as a part of the costs of said case.

(g) *Interchange of records and information.*—For the purpose of increasing the efficiency in the treatment, management and rehabilitation of persons committed to said Institution there shall be full and complete interchange between said Institution and the Departments of Correction and of Parole and Probation of records and all pertinent information relating to each of the persons so committed. It shall be the duty of said Department to provide the procedures and methods for the interchange of the records and information as required by this section. (1961, ch. 629, § 1.)

§ 19. Federal grants or loans.

Upon the approval of the Board of Public Works, the board of Patuxent Institution is hereby empowered in its discretion to apply for and receive from the federal government or any board, bureau, commission, department or other agency thereof any funds, chattels, or foodstuffs by way of grant or loan that may be available to be used in the establishment, maintenance or program of the said Institution. (1961, ch. 629, § 1.)

APPENDIX B

May 12, 1970

The Honorable Clement F. Haynsworth
Chief Judge
United States Court of Appeals for
the Fourth Circuit
10th & Main Streets
Richmond, Virginia

Re: Avey, Daniel, Sass Appeals - No. 13,415, et seq.

May It Please Your Honor:

At the oral hearing of this matter on May 8, 1970, Your Honor addressed two questions to Counsel for the Appellants and suggested that we file a brief letter memorandum indicating references to the record which supported our position:

I. UTILIZATION OF THE TRANSFER PROVISIONS OF THE DEFECTIVE DELINQUENT ACT.

At page 543 of the Joint Record Extract in this Court (App. 543) is a letter which was originally introduced in the Circuit Court for Prince George's County, Maryland, pertaining to the utilizations of the transfer provisions of Section 13(d) wherein one James H. Craig, the cell mate of Sammy Daniels, was requested to be transferred back to the penal system. The Institutional dossier on Charles Mason Tippett, a record before Your Honor, also indicates that he was, at one time, transferred back to the penitentiary. These are the only two cases that Counsel for the Appellants is aware of, although there may have been others since we did not examine all the records of Patuxent pertaining to the transfer provisions of the Act.

II. PERSONAL INTERPRETATION OF THE ACT.

Your Honor had requested a citation to the record during my remarks, and that of the *amicus*, as to whether any of the expert witnesses had indicated that the Act was being

interpreted and/or could be interpreted depending upon individual viewpoints. Page 267 of the Record before the Court of Appeals of Maryland, in Appeal No. 520 (E. 267) contains the testimony of Dr. Manfred Guttmacher as to the possibilities, if there was an inappropriate individual who was the head of Patuxent.

We trust this answers Your Honor's inquiries.

Yours very truly,

Karl G. Feissner

KGF:br
cc: The Honorable Simon E. Sobeloff
Circuit Judge
The Honorable John D. Butzner, Jr.
Circuit Judge
Alfred J. O'Farrell, III, Esq.,
Assistant Atttorney General

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAR 17 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-5276

ALBERT DELANOR MUREL, ET AL.,
Petitioners,

v.

BALTIMORE CITY CRIMINAL COURT AND DIRECTOR OF PATUXENT INSTITUTION, STATE OF MARYLAND, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS

FRANCIS B. BURCH,
Attorney General of Maryland,

HENRY R. LORD,
Deputy Attorney General
of Maryland,

EDWARD F. BORGERDING,
Chief, Criminal Division
Assistant Attorney General
of Maryland,

DONALD R. STUTMAN,
Assistant Attorney General
of Maryland,
One South Calvert Street,
Baltimore, Maryland 21202,
Telephone — 383-3737,
Attorneys for Respondents.

The Daily Record Co., Baltimore, Md. 21203

Table of Contents

	PAGE
Opinions Below	1
Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Questions Presented for Review	9
Appendix Designation	10
Statement of the Case:	
Prior Litigation	11
History of Act	15
Treatment	20
Petitioners:	
Albert Delanor Murel	23
Robert N. Hayes, Jr.	24
George Lewis Creswell	26
Bradley Arlington Avey	28
Correction of Inaccuracies in Statement of Case of Brief for Petitioners	29
Summary of Argument	33
Argument:	
I. The Definition of Defective Delinquent Is Not Unconstitutionally Vague	36
II. The Procedures Embodied in the Statute and in Trial Are Not Applied in such a Manner as to offend the Due Process Requirements of the Fifth Amendment and the Confrontation Requirements of the Sixth Amendment	43
A. The procedural safeguards within the civil commitment procedure	43
B. The applicability of the self-incrimination clause of the Fifth Amendment	51

PAGE

C. The applicability of the confrontation clause of the Sixth Amendment 53

D. The availability of treatment at Patuxent 55

E. Miscellaneous Contentions 58

III. The Objectives of the Act Are Sufficiently Implemented to Support Its Characterization As A Civil Procedure to Satisfy Constitutional Safeguards and Patuxent Institution Does Provide Actual Treatment to Distinguish It from Conventional Penal Institutions So As To Satisfy the Equal Protection Clause of the Fourteenth Amendment 59

Miscellaneous Criminal Safeguards 59

Treatment 61

IV. The Eighth Amendment Provision Against Cruel and Unusual Punishment Is Not Offended When the Statutory Requirement That A Defective Delinquent Be An "Actual Danger To Society" Is Being Applied To Offenses Against "Property" As Well As Violence Against Persons 69

V. Petitioners Were Not Deprived of Due Process and Equal Protection When They Were Denied Leave To Employ Independent Psychiatric Experts at the Government's Expense Before the District Court, Nor Were They Denied Due Process or Equal Protection When They Were Denied An Independent Psychiatrist Prior To A Finding of Defective Delinquency by Patuxent Institution 73

A. Absence of an "independent" psychiatrist before the District Court 74

B. Absence of "independent" psychiatrist during evaluation at Patuxent Institution 76

PAGE

VI. The Petitioners Were Not Denied Due Process of Law by Referral to Patuxent Institution for Examination and Determination As To Their Status As Defective Delinquents Without Notice, Hearing or Assistance of Counsel 77

VII. Petitioners Were Not Deprived of Due Process During the Examination Stage at Patuxent and in the Findings of Defective Delinquency and the Same Were Not Unreliable Findings of Fact and Not Procedurally Unfair 80

A. The statutory provisions 80

B. The fact finding process 81

C. The adjudicative process 82

D. The fact gathering process 82

E. Subsequent judicial proceedings 84

VIII. Petitioners' Privilege Against Self-Incrimination Is Not Violated by Requiring Them to Submit to an Examination Pursuant to Article 31B 85

IX. Petitioners' Rights to Confrontation under the Sixth Amendment Are Not Abridged by the Hearing Held Pursuant to Article 31B 88

X. The Standard of Preponderance of the Evidence Does Not Violate Due Process 90

XI. Petitioners Were Not Denied Constitutional Guarantees in the Review Procedures and in the Annual Examinations by the Institutional Board of Review 91

XII. The United States District Court for the District of Maryland and the United States Court of Appeals for the Fourth Circuit Did Not Err in Finding that the Act Was Consti-

PAGE

tutional on Its Face, Interpretation, Application, Administration and Result 92

CONCLUSION 94

APPENDIX A 97

APPENDIX B 126

TABLE OF CITATIONS

Cases

Baxstrom v. Herold, 383 U.S. 107 (1966) 50

Bolton v. Harris, 395 F. 2d 642 (D.C. Cir., 1968) 60

Britt v. North Carolina, ... U.S. ....., 30 L. Ed. 2d 400 (1971) 75

Brunson v. Director, 239 Md. 128, 210 A. 2d 372 (1965) 53, 89

Buck v. Bell, 274 U.S. 200 (1924) 73

California v. Byers, ... U.S. ....., 29 L. Ed. 2d 9 (1972) 86, 87

California v. Green, 399 U.S. 149 (1970) 53

Cowman v. State, 220 Md. 207, 151 A. 2d 903 (1959) 70, 71, 72

Cross v. Harris, 418 F. 2d 1095 (D.C. Cir. 1969) 60

Daniels v. Director, 238 Md. 80, 206 A. 2d 726 (1965) ..... *Passim*

Davis v. Director, Misc. Pet. No. 4410, Circ. Ct. for Montgomery County, Dec. 10, 1971 ..... 56, 57

Director v. Daniels, 243 Md. 16, 221 A. 2d 394 (1966), cert. denied, sub nom Avey v. Boslow, 385 U.S. 940 (1966) ..... *Passim*

Director v. Davis, Misc. No. 23, Court of Special Appeals of Maryland, Sept. Term, 1971 57

Duttons v. Evans, 400 U.S. 74 (1971) 53

Fleuti v. Rosenberg, 302 F. 2d 652 (9th Cir. 1962) 37

Gonzales v. United States, 364 U.S. 59 (1960) 53, 88

	PAGE
Graham v. West Virginia, 224 U.S. 616 (1912)	73
Holm v. Wyoming, 404 P. 2d 704 (1965)	50
Huddleston v. Dwyer, 323 U.S. 232 (1944)	93
In re Gault, 387 U.S. 1 (1967)	78
In re Winship, 397 U.S. 358 (1970)	91
Jacobson v. Massachusetts, 197 U.S. 11 (1905)	73
Jennings v. Mahoney, ... U.S. ....., 30 L. Ed. 2d 146 (1971)	77, 78
Kay v. United States, 255 F. 2d 476 (4th Cir. 1958)	89
Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)	12, 33, 46, 93
Kent v. United States, 383 U.S. 541 (1966)	78
Lego v. Twomey, ... U.S. ....., 30 L. Ed. 2d 618 (1972)	90
McCray v. Maryland, Misc. Pet. No. 4263 et al., Circuit Courts for Montgomery and Howard Counties, Nov. 11, 1971	56
McDonald v. Director, 236 Md. 642, 204 A. 2d 563 (1964)	71
McDonough v. Director, 229 Md. 626, 183 A. 2d 368 (1962)	56
McGautha v. California, 402 U.S. 183 (1971)	80
McKeiver v. Pennsylvania, ... U.S. ....., 29 L. Ed. 2d 647 (1971)	63
Miller v. Blalock, 356 F. 2d 273 (4th Cir. 1966)	78
Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940)	37, 50, 60
Miranda v. Arizona, 384 U.S. 436 (1966)	51, 53
Murel v. Director, 240 Md. 258, 213 A. 2d 576 (1965)	13
Neely v. Martin Keby Construction, 386 U.S. 317, reh. denied, 386 U.S. 1027 (1967)	75
Oyler v. Boles, 368 U.S. 448 (1962)	71
Palmer v. State, 215 Md. 142, 137 A. 2d 119 (1957)	38, 70
Pointer v. Texas, 380 U.S. 400 (1965)	53, 88
Richardson v. Perales, 402 U.S. 389 (1971)	53
Robinson v. California, 370 U.S. 660 (1962)	69, 71, 72

PAGE

Sas v. Maryland, 295 F. Supp. 389 (D. Md. 1969) ..... *Passim*
Sas v. Maryland, 334 F. 2d 506 (4th Cir. 1964) ..... *Passim*
Skinner v. Oklahoma, 316 U.S. 535 (1942) 50
Specht v. Patterson, 386 U.S. 605 (1967) 50, 60, 89
State v. Musgrove, 241 Md. 521 (1966) 57, 79
Strickland v. Director, No. 12537, Baltimore City Court, Feb. 1, 1972 57
Thomas v. Hogan, 308 F. 2d 355 (4th Cir. 1962) 89
Timmons v. Peyton, 360 F. 2d 327 (4th Cir. 1966) 76, 78, 83
Tippett v. Maryland, 436 F. 2d 1153 (4th Cir. 1971) ..... *Passim*
Trop v. Dulles, 356 U.S. 86 (1958) 73
United States v. Albright, 388 F. 2d 719 (4th Cir. 1968) 51, 52, 83, 87
United States v. Freed, 401 U.S. 601 (1971) 86, 87
United States v. Marion, ... U.S. ..... , 30 L. Ed. 2d 468 (1971) 61
Walker v. Director, 6 Md. App. 206, 258 A. 2d 900 (1969) 89
Wise v. Director, 1 Md. App. 418, 238 A. 2d 692, cert. denied, Wise v. Boslow, 390 U.S. 1030 (1968) 51, 87

Statutes and Rules

Annotated Code of Maryland:
Art. 31B—
§ 2 39
§ 5 ..... 3, 17, 30, 36, 69, 72
§ 6 ..... 3, 17, 77, 78, 79
§ 7 ..... 4, 18, 56, 76, 77, 79, 80
§ 8 ..... 4, 18, 80
§ 9 18
§ 10 ..... 4, 18, 40, 61, 91
§ 11 18
§ 13 ..... 18, 19
Art. 41 32

PAGE

Federal Rules of Civil Procedure:
Rule 52(a) 93

Maryland Rules of Procedure:
Rules 400-425 ..... 54, 85

Constitutions

United States Constitution:
Fifth Amendment 2, 34
Sixth Amendment 2, 34, 89
Eighth Amendment 3, 34
Fourteenth Amendment 3, 34

Miscellaneous

Boslow, "The Maryland Defective Delinquency Law; An Eight-Year Follow Up", 1963 32

Boslow, "Maryland Defective Delinquency Law", 1959 32

Boslow, "Methods and Experience in Group Treatment of Defective Delinquents in Maryland", 1961 31

"Confrontation and the Hearsay Rule", 75 Yale Law Journal 1434 53

Hodges, Dr. Emory, "Crime Prevention By the Indeterminate Sentence Law", *American J. of Psychiatry*, 128:3, September, 1971 ..... 65, 66, 67, 68

Manual of Correctional Standards, The American Correctional Association (1969 ed.) 62

Patuxent Institution Annual Report, 1971 80

"Report of the Committee of the American Psychiatric Association on the Patuxent Institution", 1960 33

"Research Report No. 29", Research Division of the Legislative Council of Maryland, December 1959 16, 55

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-5276

ALBERT DELANOR MUREL, ET AL.,
Petitioners,

v.

BALTIMORE CITY CRIMINAL COURT AND DIRECTOR OF PATUXENT INSTITUTION, STATE OF MARYLAND, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS

OPINIONS BELOW

1. *Sas, et al., v. State of Maryland, et al.*, 334 F. 2d 506 (4th Cir., 1964) (A. 1).
2. *Daniels v. Director*, 238 Md. 80, 206 A. 2d 726 (1965).
3. *Daniels v. Director*, Circuit Court for Prince George's County, #3110, Opinion December 15, 1965 (J.A. Md., 11).
4. *Director v. Daniels*, 243 Md. 16, 221 A. 2d 397 (1966), Cert. Denied, *sub. nom. Avey v. Boslow*, 385 U.S. 940, 87 S. Ct. 307, 17 L. Ed. 2d 219 (1966).

5. *Sas, et al., v. State of Maryland, et al.*, 295 F. Supp. 389 (D. Md. 1969) (J.A. 4, 5).

6. *Tippett, et al., v. State of Maryland, et al.*, 436 F. 2d 1153 (4th Cir., 1971) (A. 16).

JURISDICTION

The jurisdictional requisites are adequately set forth in Petitioners' Brief.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV

Section 1.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ANNOTATED CODE OF MARYLAND

Defective Delinquents — Article 31B

§ 5. Defined

For the purposes of this article, a defective delinquent shall be defined as an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment. (An. Code, 1951, § 5; 1951, ch. 476, § 5; 1957, ch. 558; 1961, ch. 629, § 1.)

§ 6. Request for Examination

(c) *When requests may be made.* — Such an examination may be requested and made at any time after the person has been convicted and sentenced for a crime or offense specified hereinabove in this section, provided that the said person has been sentenced to a period of confine-

ment in a penal institution or is then serving such a sentence. No such examination shall be ordered or made if the said person has been released from confinement for the particular crime or offense of which he was convicted or who is within six months of the expiration of his sentence.

(e) *Custody after examination ordered; jurisdiction of defendant.* — After the court has ordered an examination to be made under this section, said person shall be retained in custody, initially of the Department of Correction until his transfer to Patuxent Institution and thereafter in the custody of Patuxent Institution, until such time as the procedures of this subtitle for the determination of whether or not said person is a defective delinquent have been completed, without regard to whether or not the criminal sentence to which he was last sentenced has expired. The court which last sentenced the defendant, whether or not the term of court in which he was sentenced has expired shall retain jurisdiction of the defendant for the purpose of any of the procedures specified in §§ 6, 7, 8 or 9 hereof, except that the Criminal Court of Baltimore City and the Circuit Court of Anne Arundel County shall for such purposes have jurisdiction of a person last sentenced by the Municipal Court of Baltimore City and the People's Court of Anne Arundel County, respectively. (1971, ch. 491.)

§ 7. Examination

(a) *By whom made; report of findings to court; time spent in institution, etc., credited on sentence.* — Any such examination shall be made by at least three persons on behalf of the institution for defective delinquents, one of whom shall be a medical physician, one a psychiatrist, and one a psychologist. They shall assemble all pertinent infor-

mation about the person to be examined, before proceeding therewith, including a complete statement of the crime for which he has been sentenced, the circumstances of such crime, the court in which he was sentenced, the nature of the sentence, copies of any probation or other reports which may have been made about him, and reports as to his social, physical, mental and psychiatric condition and history. On the basis of all the assembled information, plus their own personal examination and study of the said person, they shall determine whether in their opinion, or in the opinion of a majority of them, the said person is or is not a defective delinquent. They shall state their findings in a written report addressed to the court, not later than six months from the date said person was received in the Institution for examination, or three months, before expiration of his sentence, whichever first occurs. If the substance of the report is that the said person is not a defective delinquent, he shall be retained in the custody of the Department of Correction under his original sentence as if he had not been examined for possible defective delinquency. Provided, however, that the said person shall be returned to the custody of the Department of Correction with full credit for such time as he has already spent in the institution for defective delinquents or within the custody of the Department of Correction including such allowances (or disallowances) relating to good behavior and/or work performed as the Board of Correction may determine under the provisions of § 688 of Article 27 of the Code. (1971, ch. 491.)

(b) *Additional examinations by psychiatrist in certain cases.* — In addition to the examination provided in the foregoing subparagraph (a), whenever a request has been made to examine any person for defective delinquency, other than a request made by such person himself or by

his attorney on his behalf, and whenever the court has on its own initiative ordered examination of any person, then such person shall be entitled, upon request, to be examined by a practitioner of psychiatry of his own choice for the purpose of determining whether he is a defective delinquent within the terms of this article; and the reasonable costs of such examination shall be defrayed by the State of Maryland from the appropriations to the judiciary, in such amount as may be approved by the court. The report of examination made by such psychiatrist shall be submitted in writing addressed to the court. (An. Code, 1951, § 7 ; 1951, ch. 476, § 7; 1957, chs. 558, 762; 1961, ch. 629, § 1; 1963, ch. 283.)

§ 8. Hearings

(a) *When required; defendant to be advised of right to counsel.* — If the institution for defective delinquents in its report on any person shall state that he is a defective delinquent, the court shall forthwith summon the person before it and advise him of the substance of the report and of the pendency of the hearing hereinafter provided; the court shall further advise him of his right to be represented at said hearing by counsel of his choice, or if he has no choice, by competent counsel appointed by the court.

(b) *Appointment and rights of counsel.* — Unless appearance of counsel chosen by the person is entered within twenty days following the proceeding set forth in subsection (a) hereof, the court shall appoint counsel to represent the person. Counsel for the person and for the State shall have access to all records, reports and papers of the institution relating to the person, and to all papers, in the possession of the court bearing upon the person's case, including a copy of the report of the institution.

(c) *When hearing held; jury.* — The hearing for determination of defective delinquency shall be held no less

than thirty days following designation of counsel, unless acceleration of the time is requested by the person or his counsel. Upon the application of the State or of the person for a jury trial, or upon its own motion, the court shall empanel a jury of twelve persons to be selected by the court from the jurors then in attendance upon said court; or if the court is in recess, the jurors shall be selected from those in attendance at the term of court at which said petition is heard. The court shall direct such jury after hearing to find specially, by its verdict, whether the person is a defective delinquent as defined in § 5. In the absence of request for finding by a jury, the court may make such determination sitting as judge and jury. (An. Code, 1951, § 8; 1951, ch. 476, § 8; 1957, ch. 762; 1960, ch. 43, § 3; 1961, ch. 629, § 1; 1963, ch. 283.)

§ 10. Petition for Review

(a) *Who may file; hearing and determination.* — After any person shall have been committed under § 9 (b) as a defective delinquent, shall have been confined for two years after such commitment, and shall have been confined for a total period, including any period of confinement under his original sentence prior to commitment under § 9 (b), equal to two thirds of his original sentence, such person or anyone in his behalf, including the director or any officer or employee of Patuxent Institution, may file a petition requesting that such person be brought before the court in which such petition is filed for the purpose of having the defective delinquency of such person redetermined. Such a petition may be filed in the law courts of the county or Baltimore City, as the case may be, either where such person was originally sentenced or which was the bona fide residence of such person when originally sentenced. The court shall forthwith proceed to hear and determine the matter. If the person so con-

fined, or anyone in his behalf, shall pray a jury trial, the court shall empanel a jury of twelve persons to be selected by the court from the jurors then in attendance upon said court; or if the court is in recess, the jurors shall be selected from those in attendance at the term of court at which said petition is heard. Any party in interest shall have the right to counsel and to process to compel the attendance of witnesses. If the court or jury, as the case may be, shall determine that such person is a defective delinquent, the court shall order said person recommitted to the institution from which he immediately came; otherwise he shall be discharged from such confinement and custody, or in the discretion of the court committed under his original sentence, less such time as he has already served in the institution for defective delinquents or within the custody of the Board of Correction, including such allowances (or disallowances) relating to good behavior and/or work performed as the Board of Correction may determine under the provisions of § 688 of Article 27 of the Code which shall apply to such person's period of commitment to Patuxent Institution with any variation of the regulations issued under said section as the Board of Correction shall consider appropriate in the particular case.

(b) *Application for further review not to be made within three years.* — After the right to apply for any such petition for review under the provisions of this section shall have been exercised once, it shall not again be sought under the provisions of this section within less than three years following the prior seeking of a petition for review from confinement under the same commitment.

(c) *Right to petition for habeas corpus not affected.* — The right to review specified in this section shall not be construed to deprive the defendant of his right to petition

for habeas corpus as it might otherwise exist. (An. Code, 1951, § 10; 1951, ch. 476, § 10; 1957, chs. 378, 762; 1961, ch. 629, § 1.)

QUESTIONS PRESENTED FOR REVIEW

1. Whether the definition of defective delinquent is unconstitutionally vague?

2. Whether the procedures embodied in the statute and in trial are applied in such a manner as to offend the due process requirements of the Fifth Amendment and the confrontation requirements of the Sixth Amendment?

3. Whether the objectives of the Act are sufficiently implemented to support its characterization as a civil procedure in order to satisfy constitutional safeguards, and whether Patuxent Institution does provide actual treatment to distinguish it from conventional penal institutions so as to satisfy the equal protection clause of the Fourteenth Amendment?

4. Whether the Eighth Amendment provision against cruel and unusual punishment is offended when those who commit crimes against property only as opposed to crimes of violence against the person are determined to be defective delinquents?

5. Whether Petitioners were deprived of due process and equal protection when they were denied leave to employ independent psychiatric experts at the government's expense before the District Court, and whether they were denied due process and equal protection when they were denied an independent psychiatrist prior to a finding of defective delinquency by Patuxent Institution?

6. Whether Petitioners were denied due process of law by referral to Patuxent Institution for examination and

determination as to their status as defective delinquents without notice hearing, or assistance of counsel?

7. Whether Petitioners were deprived of due process during the examination stage at Patuxent Institution when they were found to be defective delinquents and whether the same were unreliable findings of fact?

8. Whether Petitioners' privilege against self-incrimination is violated by requiring them to submit to an examination pursuant to Article 31B?

9. Whether Petitioners' rights to confrontation under the Sixth Amendment are abridged by the hearings held pursuant to Article 31B?

10. Whether the standard of preponderance of evidence violates due process?

11. Whether Petitioners were denied constitutional guarantees in the review procedures and annual examinations by the Institutional Board of Review?

12. Whether the United States District Court for the District of Maryland and the United States Court of Appeals for the Fourth Circuit erred in finding that the Act was constitutional on its face, interpretation, application, administration, and results?

APPENDIX DESIGNATION

The parties have agreed to the use of the appendixes heretofore used in the United States Court of Appeals for the Fourth Circuit and the Court of Appeals of Maryland. The two volume Joint Appendix used in the United States Court of Appeals for the Fourth Circuit will be hereinafter designated as "(J.A. 4)."

The two volume Joint Record Extract used in the Court of Appeals of Maryland which was accepted in evidence before the United States District Court for the District of Maryland in *Sas et al. v. State of Maryland, et al.*, 295 F. Supp. 389 (D. Md. 1969) will be hereinafter designated as "(J.A. Md.)."

Exhibits not printed in the Joint Appendix or the Joint Record Extract will be designated as Petitioners or Respondents Exhibit in the District Court or Courts Exhibit in the Circuit Court for Prince George's County.

STATEMENT OF THE CASE

History of Litigation

Petitions were filed in the United States District Court for the District of Maryland (hereinafter "District Court") by Petitioners Murel, Creswell and others, alleging that Article 31B, Annotated Code of Maryland, commonly known as the "Maryland Defective Delinquent Act" was unconstitutional. The District Court, Judges Roszel C. Thomsen, Harrison L. Winter and R. Dorsey Watkins, sitting separately, denied the petitions without a hearing and Petitioners appealed to the United States Court of Appeals for the Fourth Circuit (hereinafter "Fourth Circuit") from those decisions.

The Fourth Circuit considered the petitions in *Sas v. Maryland*, 334 F. 2d 506 (4th Cir., 1964) and held that the Act was facially constitutional stating that "[A]n examination of the trial and hearing provisions of the Act can leave no doubt that it places around the accused more procedural safeguards than any of the Acts of a similar nature which have been upheld by the courts against this attack." *Sas, supra*, 334 F. 2d at 515. The Fourth Circuit remanded the consolidated petitions for habeas corpus relief by the five patients committed to Patuxent Institu-

tion for consideration of the challenges made by Petitioners therein. The District Court was specifically directed to determine the following questions:

1. Whether the statutory definition of a defective delinquent as applied by the Maryland Court is sufficiently definitive to permit its practical application within constitutional limitations.

2. Whether the procedures embodied in the statute are applied in such a manner as to afford due process to the accused within the confrontation requirements of the Sixth Amendment.

3. Whether the proposed objectives of the Act are sufficiently implemented in its actual administration to support its categorization as a civil procedure and justify the elimination of conventional criminal procedural safeguards citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963).

4. Whether the interpretation and application of the statutory requirements that a defective delinquent be found to be an actual danger to society may within the Eighth Amendment's prohibition against cruel and unusual punishment include those whose conduct indicates no more than a danger to property rights as distinguished from violence to the person.

5. Whether Patuxent Institution does in fact furnish treatment for treatable defective delinquents as distinguished from other lawbreakers which would support the Act under the equal protection clause of the Fourteenth Amendment. *Sas, supra*, 334 F. 2d at 509.

Subsequently, other habeas corpus cases by patients of Patuxent Institution were remanded by the Fourth Circuit and consolidated with the original *Sas* cases. Counsel were appointed for the twelve petitioners and it was agreed between the court, counsel for Petitioners and counsel for the State that the prosecution of the *Sas* cases be deferred in view of *Daniels v. Director*, 238 Md. 80, 208 A. 2d 728 (1965).

In *Daniels v. Director, supra,* the Court of Appeals of Maryland remanded that case to the Circuit Court for Prince George's County (hereinafter "Circuit Court") for a determination of whether Petitioner Daniels was being subjected to cruel and unusual punishment by being compelled to endure a "life sentence" for "a petty property offense" and further stated that the Circuit Court should determine ". . . whether his continued detention at Patuxent is a violation of his constitutional rights, *Sas v. Maryland,* 334 F. 2d 506 (4th Cir. 1964)" and instructed the Circuit Court to make provision for an adequate record of the proceedings, explicit findings of fact and conclusions of law. *Daniels v. Director,* 238 Md. at 84.

Murel v. Director, 240 Md. 258, 213 A. 2d 576 (1965) before the Court of Appeals of Maryland following a redetermination hearing where Mufel was recommitted to Patuxent Institution also raised questions as to the constitutionality of Article 31B and as to whether Murel was receiving effective treatment for defective delinquency. Regarding this latter point, the Court of Appeals remanded Murel to await the final outcome of *Daniels, supra,* but broadened the scope of review in *Daniels, supra,* to be as broad as the constitutional issues outlined by the Fourth Circuit in *Sas, supra,* 334 F. 2d. *Murel, supra,* 240 Md. at 260-261.

The Circuit Court followed the instructions contained in *Daniels, supra,* and *Murel, supra,* and devoted eight days to hearing oral testimony from medical and other experts, the record ultimately covering 895 printed pages of testimony and 64 exhibits. The Circuit Court filed its opinion and findings of fact on December 15, 1965 and found the Act valid on its face, in its interpretation and application. The opinion of the Circuit Court was appealed to the Court of Appeals of Maryland which affirmed the decision and

adopted the opinion of the Circuit Court and its appendixes containing the Circuit Court's findings of fact and trial summary as its reasoning. *Director v. Daniels*, 243 Md. 16, 221 A. 2d 394 (1966) Cert. Denied, *sub. nom. Avey v. Boslow*, 385 U.S. 940, 87 S. Ct. 307, 17 L. Ed. 2d 219 (1966).

Following the decision of the Court of Appeals of Maryland in *Director v. Daniels, supra*, the District Court ruled that the record before the Court of Appeals of Maryland would constitute a part of the record before the District Court and that supplementation by either side would be permitted. Interrogatories were filed and answered and a hearing was held which lasted four trial days. The District Court considered all the questions raised by the Fourth Circuit and itself raised and considered the following questions:

> 1. Whether the statute, though fair on its face and impartial in appearance is being administered in the spirit in which it was conceived and has not become a mere device for warehousing the obnoxious and antisocial elements of society.
>
> 2. Whether deficiencies in staff, facilities, and finances have undermined the efficacy of the institution and the justification for the law and the constitutionality of its application. *Sas, supra*, 295 F. Supp. at 393.

The District Court found ". . . as a fact, and conclude[d] as a matter of law, that the Maryland Act is not only constitutional on its face, but also in its interpretation, application, administration and results." *Sas, supra*, 295 F. Supp. at 420.

Petitioners appealed the decision of the District Court to the Fourth Circuit, which considered the questions raised by it in *Sas, supra*, 334 F. 2d, the additional questions raised and answered by the District Court, and affirmed the deci-

sion of the District Court. *Tippett v. State of Maryland*, 436 F. 2d 1153 (4th Cir., 1971).

Petitioners filed a Petition for a Writ of Certiorari in this Court on May 28, 1971; the State filed a Memorandum in Opposition and this Court granted the Writ of Certiorari on December 20, 1971.

History of Act

Those involved in corrections long recognized that a group of offenders exist whose crimes result from a mental abnormality or character defect and who have long histories of persistent antisocial conduct resulting from lack of emotional control and sometimes accompanied by deficient intelligence. It had been found that they did not respond nor were they influenced by normal penological methods. It was early recognized that these individuals should not be incarcerated in conventional penal institutions but should be placed in a special institution staffed by professionals, that is, psychiatrists, psychologists, sociologists and social workers ". . . for the purpose of changing and rehabilitating the character and personality make-up of the person so that upon his release, he will, hopefully, assume a useful role in society." *Director v. Daniels, supra*, at 51.

> "The Defective Delinquent Act of Maryland is the end result of a series of studies made in Maryland between 1948 and 1950. In 1947 the legislature authorized and directed the Governor to appoint a commission consisting of doctors, judges, psychiatrists, psychologists and lawyers to study the problems of medical-legal psychiatry raised by recidivism. On December 28, 1948, the commission completed its work and submitted a report.
>
> Meanwhile, the Maryland Board of Corrections had appointed a special advisory committee of seven eminent psychologists and psychiatrists to study the

> same general problem and this committee rendered its report in January 1949. Ultimately, the two groups made a joint recommendation that a new institution should be set up for 'criminal, mental and emotional defectives', such institution to include a unit to function as a diagnostic clinic. It further recommended an indeterminate sentence law for criminal defectives to fulfill the purposes of the new institution. Thereafter, the Legislative Council of Maryland appointed a committee on medico-legal procedure, charged with the responsibility of making a study of the joint recommendations of the commission and the committee, and of drafting the proposed legislation. In 1951, the bill prepared by this committee was passed by the legislature with a few minor amendments as the Defective Delinquent Act of Maryland and codified as Article 31B of the Annotated Code of Maryland (1951)." *Sas, supra*, 334 F. 2d at 510. See also "Research Report No. 29," Research Division of the Legislative Council of Maryland, (December 1959); *Director v. Daniels, supra*, at 50-52.

The purposes of the Act were to protect society by identifying and treating those individuals who medical science could show would commit other offenses if confined untreated to the normal penological system and released. Particular success with this type institution was shown at Herstedvester in Denmark which produced an amazingly low recidivism rate in treating individuals who met the definition in Article 31B, Section 5. See generally "Research Report No. 29", *supra*.

> "In its essence, the statute rejects the age old concept that every legally sane person possesses in equal degree the free will to choose between doing right and doing wrong. Instead, it substitutes the concept that there is a category of legally sane persons who by reason of mental or emotional deficiencies 'evidence a propensity toward criminal activity' which they are incapable of controlling. For those in the category

> who are treatable it would substitute psychiatric treatment for punishment in the conventional sense and would free them from confinement, not when they have 'paid their debt to society' but when they have been sufficiently cured to make it reasonably safe to release them. With this humanitarian and progressive approach to the problem no person who has deplored the inadequacies of conventional penological practices can complain." *Sas, supra,* 334 F. 2d at 516.

A defective delinquent is defined as ". . . an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity and is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment." *Article 31B,* Section 5.

The Act sets up a comprehensive scheme for referral, examination, commitment and release. The request for examination can be made only subsequent to the imposition of an active prison sentence on conviction of a felony; a penitentiary misdemeanor; a crime of violence; a sex crime involving physical force, violence, or disparity of age between an adult and minor; a sexual act of uncontrolled or repetitive nature, or two or more convictions for any crime punishable by imprisonment. Article 31B, Section 6(a). Requests for examinations may be made by the Department of Corrections, the State's Attorney who prosecuted the crime, the individual, his attorney, or the Court. Article 31B, Section 6(b). A request for examination cannot be made if the individual has been released from confinement for the particular crime or who is within six months of the expiration of the sentence. Article 31B, Section 6(c). Following referral to Patuxent Institution,

the individual is examined by a physician, a psychiatrist and a psychologist who are required to report their findings to the court ". . . not later than six months from the date said person was received in the institution for examination, or three months, before expiration of his sentence, whichever first occurs." Article 31B, Section 7(a). If the report of the institution is that the individual is not a defective delinquent, he is returned to the Department of Corrections to complete the service of his original sentence with full credit for time spent at Patuxent Institution. Article 31B, Section 7(a). If the finding of Patuxent Institution is that the individual is a defective delinquent, he is given a full and prompt judicial hearing at which he is entitled to counsel, trial by jury, the services of an independent psychiatrist at the expense of the state, and full access to all records, reports and papers in possession of Patuxent Institution. Article 31B, Section 8(a), (b), (c). If the court or jury finds the individual to be a defective delinquent, he is committed to Patuxent Institution for an indeterminate period with the right of judicial review after the expiration of the greater of two years or two-thirds of his original sentence and at three year intervals subsequent to the original redetermination. Article 31B, Sections 9(b), 10(a), (b). If the court or jury finds that he is not a defective delinquent, he is returned to the custody of the Department of Corrections to serve his original sentence with full credit for the time spent at Patuxent Institution. Article 31B, Section 9(a). Appellate review of original or redetermination hearings is preserved. Article 31B, Sections 11, 11A.

The Act further provides that each inmate's classification shall be reviewed at least once each year by the Institutional Board of Review and further review is available through the use of the writ of habeas corpus. Article 31B, Section 13(b) and Section 10(c).

The Institutional Board of Review has the power to grant status, that is, leaves of absence, holiday leave, work release and paroles and to report to the committing court when it finds the patient no longer a defective delinquent. Article 31B, Section 13 (b), (d), (e), (f).

It may also recommend release of the patient unconditionally without regard to whether his original sentence is still in effect. Article 31B, Section 13(f).

The Act provides a multitude of safeguards for an individual referred to Patuxent Institution.

"1. He must be convicted and sentenced in a Maryland Court for a crime.

2. The crime must be of a particular category: (a) a felony or (b) a misdemeanor punishable by imprisonment in the penitentiary or (c) one of violence, or (d) a sex crime involving physical force, disparity of age, or of an uncontrolled or repetitive nature, or (e) two or more convictions for offenses punishable by imprisonment in a criminal court of this State.

3. There must be a request for examination by: (a) the Department of Correction, (b) the State's Attorney's office, (c) such person himself, (d) his attorney, or (e) the Court.

4. The Court must order the examination.

5. A copy of the order for examination must be served on the person to be examined.

6. The person must still be confined.

7. The examination must be made by at least three persons, one of whom must be (a) a medical physician, one a (b) psychiatrist and one a (c) psychologist.

8. A majority of the examiners must conclude that the person is a defective delinquent.

9. The person is entitled on request to be examined by a private psychiatrist of his own choice at the expense of the State unless he, himself, has asked for the original examination.

10. The person must, after the examination with an affirmative result, be brought before the Court and advised of the substance of the report and the pendency of the hearing.

11. He is entitled to counsel of his choice, or to competent counsel appointed by the Court.

12. Counsel has access to all records, reports and papers of the institution relating to the person and to all papers in the possession of the Court bearing on his case.

13. The person has a choice of a court or jury trial.

14. He may make application for leave to appeal from the order holding him to be a defective delinquent, although such appeal does not lie as a matter of right.

He, in addition to the specific statutory safeguards, has full opportunity to summon witnesses and to present evidence. Also, he has available to him all discovery procedure permitted under the Maryland Rules in civil cases, which is much broader than in criminal cases, including the taking of depositions, the use of interrogatories and demands for admission of facts."

Director v. Daniels, supra, 243 Md. at 43-44; See also, *Sas, supra,* 295 F. Supp. at 406-407.

Treatment

The purpose of the treatment program at Patuxent Institution is to ". . . develop internal controls within the individual in order that he may learn sufficient restraint to become a useful member of society. Otherwise stated, such aim is to enable defective delinquents, through treatment, to control their tensions, and more specifically, to help the individual gain insight into his behavior, to accept responsibility for himself and others, to adjust with relationship to his peers and authority figures, to tolerate frustration and postpone gratification of instinctional demands." *Director v. Daniels, supra,* 243 Md. at 58. Treat-

ment at Patuxent Institution consists of a total therapeutic program incorporating psychotherapeutics, educational, vocational, religious and recreation programs and a highly structured social system or therapeutic milieu. A graded tier system with tier counselling was evolved to reward socially desirable behavior. Defective delinquents are unable to internalize their conflicts and act out their antisocial behavior. It has been found that it is impossible to properly treat such individuals in a conventional mental hospital or conventional penal institution.

As set forth in *Director v. Daniels*, 243 Md. at 60-61, proper treatment for these individuals necessitated that they be treated in a separate institution that was neither a hospital nor a penal institution.

> "Patuxent presently provides effectual treatment for all treatable defective delinquents . . . denying treatment to none in that:
>
> (1) Patuxent's professional staff is adequate and competent as beginning August 15, 1965, the institution was authorized to employ 12 full-time psychiatrists (9.58 being then employed), 9 psychologists (5.5 being then employed), and 14 social workers (13 being then employed). With 485 patients on August 15, 1965, the professional staff to patient ratio was in full compliance with mental hospital staff standards promulgated by the American Psychiatric Association, and was materially higher than such ratios prevailing in the state penal and correctional institutions and in state mental hospitals in Maryland, as well as elsewhere in the country generally. Additionally, professional services of Patuxent's various advisory boards are available and are of value in the treatment program.
>
> • • • • • •
>
> (5) All inmates are considered treatable and susceptible of help at Patuxent and the institu-

tion uses most of the recognized psychiatric treat ment techniques. Upon entry each inmate is especially assigned to a psychiatrist and a social worker.

(6) Group therapy which now enjoys almost universal acceptance, and in which use Patuxent pioneered, is now generally considered by experts to be the most effective form of treatment for defective delinquents. Presently 86% of the committed patients are regularly receiving this form of psychotherapy. All patients are afforded an opportunity to receive such therapy and *non-participation is due either to recent commitment, improper attitude or outright refusal.*

(7) Individual therapy is also provided at Patuxent on a selective basis, but presently only four inmates are receiving this form of therapy, as experience there has demonstrated that defective delinquents generally do not respond well to this form of therapy." (Emphasis supplied)

Although early writings indicated that there was some understaffing at Patuxent, the testimony before the courts below show that Patuxent is now adequately staffed. (See Court Exhibit Nos. 2 and 61 B — Circuit Court) (J.A. Md., 814-840, 884-891) (J.A. 4, 212) Patuxent Institution has magnified and intensified its therapy through the creation of unit treatment teams which allow patients continuing therapy within the group so that the loss of a member of the unit treatment team does not disrupt therapy (J.A. 4, 179-180, 183-185). Patuxent Institution also provides holiday and leave status, a half-way house which provides meaningful psychiatric after care to parolees and has pioneered in vocational rehabilitation, speech therapy, and work release programs (J.A. 4, 174-178, 318). As indicated in the record below, treatment at Patuxent Institution is available to everyone (J.A. Md., 119, 215, 221-224, 287, 385,

387, 407, 636, 643) (J.A. 4, 173-175, 178-186, 252, 259, 261-268, 293-294, 313, 317, 327, 342, 344).

Patuxent Institution is one of the few facilities with single cells for patients which eliminates much of the horror of other correctional facilities (J.A. 4, 318). "The initial cost of the institution was $3,902,000 and the total cost of the physical plant to the present amounts to $7,-579,560. The facility is located about mid-way between Baltimore and Washington, at Jessup, Maryland, is comprised of ten acres, fenced. Facilities include six guard-houses, a multi-sectioned three-story defective delinquent building, a three-story diagnostic center, a kitchen-dining room, a gymnasium-theater, vocational shops and school area, a hospital (containing laboratory facilities including electroencephalographic and electrocardiographic rooms, dental offices, examination and treatment rooms), administrative offices, a psychiatric isolation section, as well as other structures and units. The entire complex is interconnected by a ground-level tunnel." *Director v. Daniels, supra*, 243 Md. at 52. Additional improvements since that time consist of a school building, chapel, additional shop space and a half-way house located in Baltimore City.

Petitioners

Albert Delanor Murel

Albert Murel was convicted in the Criminal Court of Baltimore of burglary by Judge Emory H. Niles and sentenced to one year imprisonment from September 10, 1961. On April 23, 1962, under the old Article 31B, Section 6(c), he was transferred to Patuxent Institution for examination and evaluation as to his status as a defective delinquent. He was committed to Patuxent Institution following a court trial in the Criminal Court of Baltimore before Judge Wilson K. Barnes on November 30, 1962. Murel's history of

criminal activity started as a juvenile at age 12, when he was charged with attempted burglary and placed on probation. He was later committed as a delinquent for two periods of ten months each. As an adult, his initial criminal conviction was for larceny, for which he received probation in 1959. Thereafter, he was twice convicted and received jail sentences of 60 days each for larceny, serving this time in the Baltimore City Jail. Almost immediately after release, he was convicted of breaking and entering and sentenced to one year imprisonment. His next involvement with the law is the one which led to his present confinement. Murel had a redetermination hearing in the Criminal Court of Baltimore before a jury, Judge Michael Manley presiding and was recommitted to Patuxent Institution on December 21, 1964.

Murel's adjustment to the Patuxent Institution was extremely difficult. On two occasions he was transferred to the Clifton T. Perkins State Hospital following hallucinations and suicidal ideas. Examinations at Patuxent Institution indicate that his problems are highlighted by his emotional instability and complete lack of judgment. He has strong paranoid ideatons, having ideas of persecution and grandiosity and a strong dependence on medications, especially barbiturates. Murel's condition was manifested all too frequently with his lack of contact with reality and hallucinations.

Murel was released from Patuxent Institution and all custody on July 7, 1971 following a redetermination hearing in the Criminal Court of Baltimore by Judge Robert B. Watts. (Res. Ex. 4, District Court).

Robert N. Hayes, Jr.

Robert N. Hayes, Jr., had an extensive juvenile record including robbery, escape, breaking and entering and larceny.

As an adult, he was convicted in the Criminal Court of Baltimore of robbery and assault with intent to rob, and received consecutive sentences of seven years and seven and one-half years by Judge H. Ralph Warnken in 1954. He initially began to serve his sentence in the Maryland State Reformatory, but his adjustment was extremely poor. He assaulted other inmates and custodial officers and on two occasions made unsuccessful suicidal attempts. He escaped from the Maryland State Reformatory and received an additional sentence of six months following conviction. During his stay in the Reformatory it was necessary on four separate occasions to place him in the mental observational ward. He was eventually transferred to Crownsville State Hospital as the result of his behavior at the reformatory. He remained there for a year and was returned to the reformatory in May, 1958. He was subsequently transferred to the Maryland Penitentiary because of his inability to properly adjust to the reformatory. At the penitentiary his adjustment followed the same course. He cut an inmate with a piece of glass and attempted to cut a custodial officer with a homemade knife. During his stay at the penitentiary he set fire to his bed and cut his arm with a razor blade. He was again transferred to Crownsville State Hospital in May, 1959 where he remained for approximately six months before his return to the Maryland Penitentiary. In 1960 a further series of incidents occurred at the penitentiary regarding Hayes. He again set his bed on fire and defecated on his cell floor. He was transferred to Crownsville State Hospital remaining there until March 1960 when he was transferred to Clifton T. Perkins State Hospital. Hayes was eventually transferred from there to the Patuxent Institution for evaluation and determination as to his status as a defective delinquent on October 4, 1960. He was committed to the Patuxent Institution as a defective delinquent following a jury trial in

the Criminal Court of Baltimore, Judge Michael E. Manley presiding, on November 10, 1961 but was released on a writ of habeas corpus on September 24, 1963. Hayes was subsequently convicted of forgery and possession of a deadly weapon for which he received concurrent eighteen month sentences on each conviction and was sent to the Maryland House of Correction. Following his release, he was convicted on September 5, 1965 of storehouse breaking in the Criminal Court of Baltimore, without a jury, Judge James A. Perrott presiding, and received eight years imprisonment. He was again referred to Patuxent Institution and has refused all attempts at evaluation.

The files at Patuxent Institution indicate that Hayes has been diagnosed as a schizophrenic reaction-paranoid type. There is also evidence of chronic brain syndrome with epilepsy associated with psychotic episodes. He is a highly emotional, disturbed individual who is unable to adequately perceive reality. Hayes functions under great turmoil and if released to society would respond with aggressive and antisocial behavior in order to reduce some of the tension under which he functions. It is therefore more than evident that he qualifies as a defective delinquent.

George Lewis Creswell

George Lewis Creswell was convicted of breaking and entering and larceny in the Circuit Court for Cecil County by Judge E. D. E. Rollins and sentenced to two years imprisonment from July 11, 1958. At sentencing, he was ordered by Judge Rollins to Patuxent Institution for examination and determination as to his status as a defective delinquent and was thereafter committed as a defective delinquent following a court trial, Judge Rollins presiding, in the Circuit Court for Cecil County on March 6, 1959.

Creswell's previous history of criminal involvement was all as a juvenile. It began at the age of 13 when he broke into a factory and several homes and was placed on probation. Later, again breaking into houses, he was committed to the Maryland Training School for Boys where he remained for approximately one year. Upon release, he immediately stole a car, again broke and entered houses and was again committed to the Maryland Training School. When he was released approximately one year later in 1958 he immediately got into difficulty again, committing a breaking and entering and larceny, which resulted in his present convictions. Creswell has had three redetermination hearings all before juries in the Circuit Court for Cecil County, and was recommitted to Patuxent Institution on the following dates: 1) September 20, 1961, Judge E. D. E. Rollins presiding; 2) January 25, 1966, Judge George B. Rasin, presiding, and 3) March 7, 1970, Judge J. Albert Roney presiding.

The reports from Creswell's file at Patuxent Institution indicate that he is a mental defective. His attitude toward society is rebellious and utterly antagonistic which, because of his poor intellectual endowment, makes him quite dangerous to society and little help to himself. His initial adjustment to Patuxent Institution was stormy but he eventually began to participate and at the time of the hearing in the District Court had been released on parole status and voluntarily came in to court to testify (J.A. 4, 59-67). Following his parole on April 22, 1968 he again got into difficulty. He was convicted on January 7, 1969 of conspiracy to escape, attempt to escape and assault and battery in the Circuit Court for Cecil County by a jury, Judge H. Kenneth Mackey presiding and sentenced to three concurrent two year sentences on each conviction. On January 8, 1969 he was convicted of receiving stolen goods and storehouse

breaking by a jury, Judge H. Kenneth Mackey presiding, and received two years imprisonment for receiving stolen goods and ten years imprisonment for storehouse breaking, the sentences to run consecutively. His parole was revoked on October 2, 1968 and he was returned to Patuxent Institution (Res. Ex. 2. — District Court).

Bradley Arlington Avey

Bradley Arlington Avey was convicted in the Circuit Court for Prince George's County on two cases of assault with intent to murder and storehouse breaking on November 16, 1965, for which he was sentenced to twenty-four years imprisonment by Judge Robert B. Mathias and referred to Patuxent Institution for evaluation and determination as to his status as a defective delinquent. On June 25, 1968 Avey was released from Patuxent following an order of the Court of Special Appeals of Maryland which granted Avey a new trial. Following a subsequent conviction for the same crime and the same sentence, he was again transferred to Patuxent Institution on May 9, 1969. Avey was committed to Patuxent Institution as a defective delinquent on March 13, 1970 following a court trial in the Circuit Court for Prince George's County, Judge Samuel W. H. Meloy presiding.

Avey has an extensive record of past criminal activity beginning with breaking and entering for which he received twelve months imprisonment in Virginia on February 7, 1954; carnal knowledge in Baltimore, Maryland for which he received two years imprisonment on July 28, 1957; interstate transportation of a stolen motor vehicle and violation of the Selective Service Act for which he served two months in Richmond, Virginia, and he later served twenty months and two days in the Lewisburg, Pennsylvania Reformatory on the same offenses. He was later convicted of interstate transportation of a stolen

motor vehicle and received thirty months in the Lewisburg Penitentiary and thereafter was convicted on four counts of forgery for which he received six months imprisonment each, to run concurrently, in Manassas, Virginia. The latest conviction was the result of a storehouse breaking and subsequent gun battle with police.

Following his commitment, Avey's participation was good until June 24, 1971 when he escaped after earning a minimum security clearance. Avey was involved in a car explosion, spent his convelescence at the University of Maryland Hospital in Baltimore City and was again returned to Patuxent Institution on July 19, 1971.

The records of Patuxent Institution indicate that Avey is an unpredictable, explosive, destructive individual whose impulsive behavior shows no concern with the consequences to himself or others. He is emotionally flat and a person whose impulse controls are fragile and weak. These symptoms of emotional unbalance, coupled with his clear propensity toward antisocial activities, illustrate that Avey is a definite danger to society and a classic example of a defective delinquent (Res. Ex. 2—District Court).

Correction of Inaccuracies in Statement of Case of Brief for Petitioners

All counsel for Petitioners on remand from the Fourth Circuit to the District Court agreed that the original and redetermination proceedings as to all Petitioners met with the constitutional safeguards of due process. The District Court found that the last redetermination hearing of former Petitioner Tippett also met the constitutional standards of due process. *Sas, supra*, 295 F. Supp. at 395, 400.

In addition, Appellees (hereinafter collectively referred to as the "State") desire to correct certain inaccuracies in the Statement of Case in the Brief for Petitioners.

Testimony before the Circuit Court indicated that there was a distinction between a defective delinquent and recidivist criminal, and the same were marked by precise differences. Dr. Isadore Tuerk stated that "[I] would feel that the distinction would be that in a defective delinquent that there was through the individual's difficulties, a personality structure, an intellectual level, a behavior pattern characterized by danger to other individuals and property of a serious degree." (J. A. Md., 585) (J. A. 4, 182, 255, 470, 709).

The two pronged attack on the definition in Section 5 of the Act in the lower courts concerned the definition of the term "emotional unbalance" and a general allegation that the whole definition was too general. The testimony below by experts in the field of psychiatry and correctional reform indicate that the term "emotional unbalance" is susceptible of standard definition by practitioners in the field (J. A. Md., 162-163, 188, 272-274, 352, 403-404, 460, 464, 707). The thrust of this testimony was that the use of the term "emotional unbalance" when used in connection with the rest of the statute makes the same a readily understandable and definable term. Further, the testimony indicated that the whole definition set forth in precise non-technical terms, readily understood by the laity, a psychiatrically accepted and recognized mental or personality disorder which can be ascertained and diagnosed with a high degree of unanimity among experienced psychiatrists. (J. A. Md., 124, 161-162, 181-182, 188, 201-202, 238, 272-275, 283, 299-300, 325, 188-189, 662-663, 667, 683-684, 698-699, 712). (See also Exhibit No. 17, pages 14-16, Exhibit No. 54A, pages 8-12, Exhibit No. 54 B, page 21 — Circuit Court); *Director v. Daniels, supra,* at 56. Petitioners' reference to their expert's testimony indicates that not only did their expert have trouble with the definition

in Section 5 of the Act but also had trouble in interpreting the McNaughton Rule bearing on the issue of responsibility for criminal conduct (J. A. Md., 350). Although the experts in the Circuit Court testified that, with rare exceptions, those individuals adjudicated defective delinquents under the act would be drawn from a class designated by some psychiatrists as "sociopaths" or "psychopaths," the Maryland definition is in no way dependent for its validity on the use of such psychiatric terms, labels, or other naming devices (J. A. Md., 166, 169, 170-171, 203, 230, 238, 287-288, 388, 662) (J. A. 4, 278, 351-352).

In "Methods and Experience in Group Treatment of Defective Delinquents in Maryland," 1961, (J. A. 4, 503-505) the author discusses the use of group therapy as the treatment of choice at Patuxent. The testimony below by Dr. Manfred Guttmacher, Dr. Jerome B. Frank, Dr. Harold M. Boslow and Judge William S. Thomas, indicated that group therapy is the predominant modality at Patuxent since the Institution's experience shows that a defective delinquent does not relate well on a one-to-one relationship with a therapist and can derive more benefit from treatment in a group setting (J. A. Md., 774-775). See also (J. A. Md., 221, 385, 409, 631, 688, 774); *Director v. Daniels, supra,* at 61. Private psychiatrists are not allowed to treat at Patuxent Institution as they could not work within the framework of the Institutional program and such a practice would be open to abuse (J. A. Md., 556-557, 767). The testimony below further showed that there is no cataclysmic effect when doctors are required to testify against their patients at trial. Dr. Guttmacher felt that such testimony may have a positive effect on patients (J. A. Md., 240, 253, 317-318, 739).

Petitioners misconstrue Dr. Guttmacher's statement that an improper person as Director of Patuxent Institution

would result in a dangerous situation. What Dr. Guttmacher meant was that having an improper person as Director was possible. This, however, overlooks the obvious fact that the same situation pervades any establishment whether public or private. Dr. Guttmacher further pointed out that the courts act as an effective check on the power of the Director. Further, the Director is subject to the Board of Governors of Patuxent Institution, the Institutional Board of Review, whose responsibilities are delineated in Article 31B, Section 13 and the Secretary of Public Safety and Correctional Services who supervises Patuxent Institution pursuant to Article 41, Annotated Code of Maryland (J. A. Md., 257, 267, 775).

Although the custodial force at Patuxent Institution is drawn from a list of individuals submitted to all the correctional institutions in Maryland, the testimony below showed that the custodial staff at Patuxent Institution are given in-service training when they arrive at Patuxent Institution and that the Director continually makes every effort to see that more training is available (J. A. Md., 394, 772) (J. A. 4, 318-319).

Petitioners misconstrue the statement from the "Maryland Defective Delinquency Law," 1959 (J. A. 4, 501-503) when they indicate that a disproportionately large percentage of the criminal population may be referred to Patuxent Institution for examination. In actual practice, the persons responsible for referring individuals to Patuxent Institution for examination use their discretion and the institution has not been flooded with requests for examination (J. A. 4, 502).

Finally, Petitioners further misconstrue the article "The Maryland Defective Delinquency Law; An Eight Year Follow Up," 1963 (J. A. 4, 506-509). Dr. Boslow testified below that as Director he testifies in most of the original and

redetermination hearings which leaves the remainder of the staff free to treat (J. A. Md., 739). Citing from the "Report of the Committee of the American Psychiatric Association on the Patuxent Institution," 1960 (J. A. 4, 491-499), that it is bad medical practice for an evaluating doctor to testify against a patient the testimony below shows that having the treating doctor testify is not entirely a negative factor and that, as far as possible, the treating doctor does not testify (J. A. Md., 240, 252, 317-318, 739) (J. A. 4, 317); *Sas, supra*, 295 F. Supp. at 419. Further, the educational program at Patuxent Institution was adequately staffed and was not a trial period for a great social experiment (J. A. Md., 757) (J. A. 4, 324).

SUMMARY OF ARGUMENT

Article 31B was originally found facially constitutional by the United States Court of Appeals for the Fourth Circuit, but that Court remanded to the United States District Court for the District of Maryland for a determination of whether the definition was rendered unconstitutionally vague by the Court of Appeals of Maryland when that Court appeared to insert the term "psychopath" into the definition. Testimony before the Circuit Court for Prince George's County and findings by that Court and the Court of Appeals of Maryland were that the Court of Appeals did not incorporate the vague term "psychopath" into the definition and that the definition set forth in precise, non-technical terms, which were readily understood by the laity, a psychiatrically accepted mental or personality disorder which could be ascertained and diagnosed with a high degree of unanimity among psychiatrists, and a definition which could be easily applied in a jury trial.

Article 31B is civil in nature as found by the lower courts under the tests laid down by this Court in *Kennedy v. Mendoza-Martinez* and they further held that even if

not purely civil in nature, the Act did not deprive Petitioners of their rights against self-incrimination under the Fifth Amendment of the United States Constitution, nor did it deprive Petitioners of their right to confrontation under the Sixth Amendment of the United States Constitution in that Petitioners had adequate remedies by way of subpoena power and discovery procedures to enforce their rights of confrontation.

Article 31B does not deprive Petitioners of equal protection of the law under the Fourteenth Amendment of the United States Constitution in that the Legislature of Maryland has the right to define a class of individuals and segregate them in an institution where treatment would be provided to cure them and was so found by the lower courts. Treatment under the Act is required as found by the lower courts and all patients committed to Patuxent Institution have a right to and do receive treatment for their disorder.

The Eighth Amendment of the United States Constitution is not offended, as individuals referred to Patuxent Institution are not committed as defective delinquents solely on the basis of crimes against property without a finding of possible harm to other individuals in society as found by the District Court.

Petitioners are not denied due process of law when they are referred to Patuxent Institution for evaluation and determination as to their status as defective delinquents when the referral is made without a hearing or assistance of counsel. A referral to Patuxent Institution is made subsequent to a conviction for a crime and the imposition of an active criminal sentence as part of the dispositional process, and if the individual is found not to be a defective delinquent, he is returned to the Department of Correc-

tion to serve the balance of his criminal sentence. A hearing and assistance of counsel at this stage are not constitutionally mandated.

The process whereby Patuxent Institution collects information regarding an individual's past history and their personal examinations of individuals referred to Patuxent Institution are reliable fact-finding procedures, and the denial of counsel or an independent psychiatrist before a determination of defective delinquency is made by Patuxent Institution does not deprive Petitioners of due process of law.

Subsequent to commitment as a defective delinquent, Petitioners have adequate appellate remedies to challenge a finding of defective delinquency; the statutory procedure for redetermination hearings is reasonable to protect Petitioners' rights to review, along with the yearly evaluation by the Institutional Board of Review of Patuxent Institution; and the preservation of the writ of habeas corpus with which Petitioners may test the legality of their detention if they are not, in fact, receiving treatment.

Petitioners were not deprived of due process of law when the District Court refused to grant them the right to have an expert psychiatric witness testify when the testimony would be repetitive of the testimony heard in the Maryland courts and made a part of the record before the District Court. Petitioners were likewise not denied due process during the examinations at Patuxent Institution and the United States Court of Appeals for the Fourth Circuit found that a psychiatrist during examination was not constitutionally mandated.

The requirement that an individual be found to be a defective delinquent by a preponderance of the evidence does not violate the due process clause and is not constitutionally mandated as found by the Fourth Circuit.

Article 31B has been found by independent evaluation to provide effective treatment and to return those committed to Patuxent Institution to society free of their mental disorder and with the strong likelihood that more than two-thirds of those released from Patuxent Institution have been cured.

ARGUMENT

I.

THE DEFINITION OF DEFECTIVE DELINQUENT IS NOT UNCONSTITUTIONALLY VAGUE.

Petitioners' contention that the definition is vague rests primarily on the assumption that the Court of Appeals of Maryland incorporated the term "psychopath" into Article 31B, Section 5.

Article 31B, Section 5, defines a Defective Delinquent as ". . : an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment."

Testimony from the experts in the Circuit Court was unanimous in finding that the definition in Article 31B, Section 5, sets forth in precise, non-technical terms readily understood by the laity, a psychiatrically accepted mental or personality disorder which can be ascertained and diagnosed with a high degree of unanimity among experienced psychiatrists (J.A. Md., Guttmacher, 161-162, 181-182, 238; Menninger, 272-275, 283, 299-300; Roche, 188-189; Boslow, 662-663, 667; Judge Thomas, 683-684, 698-699.)

These same experts testified that, although with rare exceptions, those individuals adjudicated defective delinquents under the Act would be drawn from a class designated by some psychiatrists as "sociopaths" or "psychopaths", the Maryland definition is not dependent for its validity on the use of such psychiatric terms, labels or other naming devices (J.A. Md., Guttmacher, 166, 169, 170-171, 238; Menninger, 287-288; Roche, 203; Frank, 388, Boslow, 662). *Fleuti v. Rosenberg*, 302 F. 2d 652 (9th Cir., 1962) is not applicable to the Act where the definition is in no way dependent on the term "psychopath".

In *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940) the Appellant had filed for a Writ of Prohibition to prevent the Probate Judge from trying him as a "psychopathic personality" under Minnesota's Act. The Act had been defined to apply to persons who by an habitual course of conduct showed an utter lack of power to control their sexual impulses and hence were likely to attack others or otherwise inflict injury. This Court upheld the statute stating that there was a rational basis for the class selected by the legislature and that the definition was not so vague or indefinite as to constitute invalid legislation.

It was acknowledged by the Fourth Circuit in *Sas, supra*, 334 F. 2d that "[I]t is obvious that the Maryland statutory definition was carefully drawn to conform to the definition approved by the Court in the Minnesota case," referring to *Minnesota ex rel. Pearson v. Probate Court, supra*, where this Court upheld the constitutionality of the Minnesota Psychopathic Personality Act. 334 F. 2d at 514.

The Fourth Circuit also held in *Sas, supra*, 334 F. 2d that the Act was facially constitutional:

> "We hold that statute [Article 31B, Annotated Code of Maryland] to be facially constitutional; i.e., it is within the power of the state to segregate from among its lawbreakers a class or category which is dangerous to the public safety and to confine this group for the purpose of treatment or for the purpose of protecting the public from further depredations." *Sas, supra,* 334 F. 2d at 509.

The interest of the Fourth Circuit in the definition had arisen from its conclusion that the Court of Appeals of Maryland had construed the statutory definition to include a "psychopath", a term which is not susceptible of definition. Referring to *Palmer v. State,* 215 Md. 142, 137 A. 2d 119 (1957), the Circuit Court in its decision stated:

> "It seems clear to us that a reading of the *Palmer* case, in light of the testimony before us in this case, justifies the conclusion that the Court of Appeals was not in fact importing the term 'psychopath' into the statutory definition but that they were merely incidentally seeking another way of describing some emotionally unbalanced persons. In other words, its use in the opinion was merely an effort to seek a synonym for the term 'emotional unbalance' and not, in fact, a positive holding that the term 'psychopath', minus a description of what was meant by the use of that term, was being engraphed into and made a part of the definition. We believe, in view of the testimony, particularly of Drs. Menninger and Guttmacher, and the fact that the term is no longer and was not at the time of the *Palmer* opinion, a part of the nomenclature recommended by the American Psychiatric Association, that it is unfortunate that the term was used by the *Palmer* court . . . We conclude that in the light of the testimony in this case there is no need to give any further medical description to the non-medical term 'emotional unbalance' and that if the matter is squarely before the Court of Appeals that court will conclude that the term 'psychopath' is not a part of the definition, is not a

> synonym for emotional unbalance but that the term 'emotional unbalance' as used in the Act refers to a medically recognized psychiatrically disordered person who demonstrates 'persistent aggravated antisocial or criminal behavior', and who exhibits a type of psychiatric disorder manifested by deep-seated emotional conflicts which distort the individual's attitude towards society, and of society's attitude toward him resulting in an uncontrollable desire and the need to create continual hostile acts towards society and which is uncontrollable by the individual . . . With this description of the term 'psychopath' we feel the use of the term in the *Palmer* case does not destroy the validity of the statutory definition so as to cause it to become vague and meaningless, as was found to be a fact by the Ninth Federal Circuit Court of Appeals. In the statute involved in that case the term 'psychopath' was used without further amplification or definition, hence its use compelled the holding of insufficient clarity to meet constitutional requirements. *Fleuti v. Rosenberg*, 302 F. 2d 652 (1962)." *Director v. Daniels*, 243 Md. at 36-37.

In affirming the Circuit Court in *Director v. Daniels, supra*, the Court of Appeals of Maryland accepted the findings of the Circuit Court and effectively excluded from the definition any possible use of the term "psychopath". *Sas, supra*, 295 F. Supp. at 399. Examination of the working definition of Defective Delinquency dispels all doubts which were raised by the collateral "psychopath" question.

Petitioners state that under the Minnesota statute construed in *Minnesota ex rel. Pearson v. Probate Court, supra*, that the physicians were licensed; that standards of judging sexual psychopaths were different and the inmate could petition for release at any time. Under the Act, Article 31B, Section 2, the standards for the Director are sufficiently set out and the testimony before the lower courts was that proper psychiatrically trained physicians

were available at the Institution. The standards for judging defective delinquency are clearly set out in the Act and further, Article 31B, Section 10(c) saves the writ of habeas corpus for patients at Patuxent. Under the expanding concepts of the Eighth Amendment to the Constitution of the United States, the courts of the State of Maryland have been liberally construing the writ of habeas corpus and entertain all objections by those incarcerated in normal penal institutions and those committed to Patuxent Institution.

It is also stated by Petitioners at page 24 of their Brief that ". . . where doctors disagree (J.A. Md., 274) the law cannot delegate to them the delicate task of testifying to and of almost necessity determining the ultimate issue in a proceeding which leads to indeterminate confinement without maximum or minimum limits." This statement is contrary to the testimony in the Circuit Court and Petitioner's citation to the Joint Extract disproves this hypothesis. The reference to page 274 of the Joint Extract in the Court of Appeals of Maryland (J.A. Md., 274) contains testimony by Dr. Guttmacher that the definition is clear among experts in the field. See also *Director v. Daniels, supra*, 243 Md. at 53-54.

The Petitioners have quoted from an article by Thomas Sanford Bates regarding the definition of defective delinquent and intimate that the Director of Patuxent Institution disagreed with the definition and felt it was unworkable. The Director, when confronted with this quotation from the Bates article while testifying before the District Court, stated the following:

> "(The Witness) It is not true that I said that. I don't remember what he said. I am afraid he is not speaking for me. If I remember correctly, he asked me, whether New Jersey's definition was satisfactory. I said for

> New Jersey it is. He then asked me was I satisfied with the definition. I told him that no, I am not satisfied with the definition, but he forgot to say what was the most important part of the thing, that although I am not satisfied with the definition, I have not found anything that would replace it. It is the best available definition I have come up with yet . . . What Mr. Bates was, he just quoted part of what I said, and not the other part, not the important part." (J.A. Md., 738-739.)

Petitioner's other reference to the Bates article regarding "emotional unbalance" used to justify commitment of an individual for life is unrealistic. It pulls a single element from the definition to indicate that the whole is inflexible. Clearly, the testimony from the experts is that the definition, taken as a whole, is readily understood by psychiatrists and the laity and easily applicable in a jury trial.

The Brief of Petitioners further relies on a letter to J. V. Bennett from Mr. Bates to indicate that incarceration for intellectual deficiency or emotional unbalance alone is improper. This again is contrary to the record below. Dr. Peter Lejins, a leader in the field of correctional reform, testified before the Circuit Court regarding Mr. Bennett's statement as to "emotional unbalance" at page 41 of the Petitioner's Brief. He said that:

> "But I would say this much, that, for instance, using the words 'emotional imbalance', and I believe that second term in connection with emotional imbalance or immediately after emotional imbalance was 'mental deficiency,' or whatever term was used there, I think the terms are used here somewhat misleadingly, in saying that the staff of the Patuxent Institution on the basis of emotional imbalance suggests a life sentence. I do not agree with such a formulation because emotional imbalance could be injected into the definition, but it is only a part of the definition which appears,

I believe, in the Defective Delinquent Act, in paragraph 5, and when the emotional imbalance is read or seen within the context of that definition, it is not as vague a term as it appears when it is used in common parlance, and in general — emotional imbalance then begins something that leads to the proven dangerousness of the offender to the society, proven through several convictions and emotional imbalance means that. When you take emotional imbalance out of the context of this definition, and just simply say 'emotional imbalance' is the reason for the definition of the staff that this is a candidate for the Patuxent Institution you are actually beginning to use emotional imbalance in a different sense, in a popular sense . . . What I am trying to say is when you use emotional imbalance within the context of this definition, it means something specific, emotional unbalance which has been demonstrated as to endanger actual society. When you take the term out of the context and refer to emotional imbalance as a reason for a life sentence, then you are actually sort of misleading your listener in that sense. Secondly, I would say it is not a life sentence." (J.A. Md., 460-461.)

Further, Dr. Lejins, in discussing Mr. Bates' letter to Mr. Bennett stated the following:

"Now, to you as a sociologist or criminologist, are the terms 'intellectual deficiency' and 'emotional imbalance' foreign terms to your field?

Answer: No.

Question: They are not?

Answer: And I would say as a criminal lawyer or a professor of criminology, let's say, I am very familiar with these terms throughout the centuries of criminal jurisprudence, because the intellectual impairment or intellectual lack of maturity and emotional lack of balance and again maturity, have been always considered the elements in construing the concept of criminal responsibility, and I think from the legal

point of view, long before social science even emerged, these two concepts have been constantly used in construing the concepts of criminal responsibility." (J.A. Md., 463.) See also (J.A. Md., 162-163, 188, 272-274, 352, 403-404, 460, 464, 707).

Finally, Petitioner's contention is that the findings in the report to Governor Tawes dated December 17, 1964, by the Blue Ribbon Committee indicating that the administration of the Act had gotten out of hand at Patuxent, is not true. A reading of that report reveals to the contrary. (J.A. Md., 509-511.)

The definition of a defective delinquent is constitutional. *Sas, supra,* 295 F. Supp. at 399.

II.

THE PROCEDURES EMBODIED IN THE STATUTE AND IN TRIAL ARE NOT APPLIED IN SUCH A MANNER AS TO OFFEND THE DUE PROCESS REQUIREMENTS OF THE FIFTH AMENDMENT AND THE CONFRONTATION REQUIREMENTS OF THE SIXTH AMENDMENT.

Petitioners second argument rests primarily on the thesis that no treatment is available at Patuxent; that there is no preliminary determination to see if the individual would be aided by treatment; that the examination procedures violate the Fifth Amendment; that the confrontation requirements of the Sixth Amendment are not met at trial and other miscellaneous allegations.

A. The Procedural Safeguards Within the Civil Commitment Procedure.

The District Court found that whether the Act was characterized as civil or criminal, all due process requirements are amply protected. *Sas, supra,* 295 F. Supp. at 405. Further finding that the procedural requirements of the Act fully protect an individual referred to Patuxent Insti-

tution for evaluation, the Court reemphasized those requirements as found by the Circuit Court in *Director v. Daniels, supra:*

"The procedural requirements of the Act include these safeguards to the defendant:

1. He must be convicted and sentenced in a Maryland Court for a crime.

2. The crime must be of a particular category: (a) a felony or (b) a misdemeanor punishable by imprisonment in the penitentiary or (c) one of violence, or (d) a sex crime involving physical force, disparity of age, or of an uncontrolled or repetitive nature, or (e) two or more convictions for offenses punishable by imprisonment in a criminal court of this State.

3. There must be a request for examination by: (a) the Department of Correction, (b) the State's Attorney's office, (c) such person himself, (d) his attorney, or (e) the Court.

4. The Court must order the examination.

5. A copy of the order for examination must be served on the person to be examined.

6. The person must still be confined.

7. The examination must be made by at least three persons, one of whom must be (a) a medical physician, one a (b) psychiatrist and one a (c) psychologist.

8. A majority of the examiners must conclude that the person is a defective delinquent.

9. The person is entitled on request to be examined by a private psychiatrist of his own choice at the expense of the State unless he, himself, has asked for the original examination.

10. The person must, after the examination with an affirmative result, be brought before the Court and advised of the substance of the report and the pendency of the hearing.

11. He is entitled to counsel of his choice, or to competent counsel appointed by the Court.

12. Counsel has access to all records, reports and papers of the institution relating to the person and to all papers in the possession of the Court bearing on his case.

13. The person has a choice of a court or jury trial.

14. He may make application for leave to appeal from the order holding him to be a defective delinquent, although such appeal does not lie as a matter of right.

He, in addition to the specific statutory safeguards, has full opportunity to summon witnesses and to present evidence. Also, he has available to him all discovery procedure permitted under the Maryland Rules in civil cases, which is much broader than in criminal cases, including the taking of depositions, the use of interrogatories and demands for admission of facts.

'. . . An examination of the trial and hearing provisions of the Act can leave no doubt that it places around the accused more procedural safeguards than any of the Acts of a similar nature which have been upheld by the Courts against this attack.' *Sas v. Maryland, supra.* Also see *Minnesota, ex rel. Pearson v. Probate Court, supra* and *Buck v. Bell, supra.*" *Director v. Daniels, supra,* 243 Md. at 43-44.

Petitioners' contentions relate to whether the Act preserves those elements of due process which are necessary to uphold the constitutionality of Article 31B. In *Sas, supra,* 334 F. 2d the Fourth Circuit found that:

"The answer to all these objections is that with respect to state action, repeated decisions of the Supreme Court have put it beyond the range for further debate that the 'due process' clause of the fourteenth amendment has not the effect of imposing upon the state any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal are not interfered with." *Sas, supra,* 334 F. 2d at 515.

The court then proceeded to state that the Act provides adequate procedural safeguards not ordinarily found in other civil proceedings. *Sas, supra,* 334 F. 2d at 516.

Petitioners also question the categorization of the Act as civil with the concommitment elimination of conventional criminal procedural safeguards. Whether the Act is civil (regulatory) or criminal (penal) was originally characterized by the Fourth Circuit as a futile exercise in semantics. *Sas, supra,* 334 F. 2d at 516. But see *Tippett, supra,* 436 F. 2d at 1157. However, this court in *Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963), set forth seven tests to determine whether an act is civil or criminal. These tests were considered by the Circuit Court in *Director v. Daniels,* 243 Md. at 37-40, where that court found, under those tests, that the act was civil.

> "The Maryland Court of Appeals in *Eggleston v. State, supra,* decided the Act was regulatory in character and therefore not penal but civil in nature. It becomes vital that there be a proper determination as to the correctness of this conclusion because only if the statute is regulatory can the precise criminal procedures required to uphold the constitutionality of a penal statute be dispensed with. If, on the other hand, the act is regulatory and therefore civil in nature, the Fourteenth Amendment of the Constitution's requirement is met if there is provided reasonable safeguards under the circumstances which include consideration of the fact that persons may be deprived of their liberty for the good of society and themselves. It seems clear that if there exists affirmative evidence that the act results from a legislative intent to regulate rather than punish, the law is deemed to be civil in nature. *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 9 L. ed. 2d 644, 83 S. Ct. 554 (1963). We conclude from the evidence before us that the legislative history of the Defective Delinquent Act[4] clearly demonstrates that its sole objective

and purpose was not penal but an effort to segregate a known group of mentally disordered people who are found guilty of criminal acts, by confining them in an institution housing only members of their group in a sole effort to protect society and provide treatment to effect, if possible, a cure of the illness. From the history it is clear that the legislative imposition of sanctions by restraining the individual results from studies that indicate that such restraint is necessary both for the protection of society and to provide medical treatment to further curative measures. In short, it is the State's effort to determine the cause of a criminal's acts and if associated with mental disorder to accomplish improvement under psychiatric supervision so that he may hopefully be released, no longer a danger to himself or society. This act now before the Court is so similar in design and has a legislative purpose so similar to the act that was before the Supreme Court in *Minnesota, ex rel. Pearson v. Probate Court, supra,* that we believe the decision of that court upholding the constitutionality of the Minnesota Sexual Psychopath Law is direct authority for our conclusion that this act is civil in nature. We further point out that the purpose of this act is so closely akin to the so-called 'Sexual Psychopath' laws enforced in some twenty (20) states and the District of Columbia, that the decisions of the Courts in those jurisdictions that each of their laws is civil in nature is ample authority to conclude that the Maryland Act is regulatory. *State v. Madary,* 178 Neb. 383, 133 N.W. 2d 583 (1965); *People v. Levy,* 151 Cal. App. 2d 460, 311 P. 2d 897 (1957); *Miller v. Overholser,* 92 U.S. App. D. C. 110, 206 F. 2d 415 (1953); *In re Miller,* 98 N. H.-107, 95 A. 2d 116 (1953). See also cases cited in annotation under 'Sexual Psychopaths,' 24 A.L.R. 2d 350.

Assuming, however, that contrary to our finding here, there exists no conclusive evidence of legislative intent as to whether or not the act is penal or civil in nature, the answer to this question must be determined from the face of the Act after considering the following:

> '. . . whether the sanction involves an affirmative disability or restraint; whether it has historically been regarded as a punishment; whether it comes into play only on a finding of scienter; whether its operation will promote the traditional aims of punishment, that is, retribution and deterrence; whether the behavior to which it applies is already a crime; whether an alternative purpose to which it may rationally be connected is assignable for it; and whether it appears excessive in relation to the alternative purpose assigned.' *Kennedy v. Mendoza-Martinez, supra.*

After considering these factors, we conclude that the statute on its face supports the conclusion that the act is civil in nature. We find this for the following reasons: Even though the sanction does involve an affirmative restraint it is provided only because it is deemed best for the protection of society and best for the protection and treatment of the individual that he be placed in a maximum security institution maintained solely for defective delinquents and not for other members of the criminal element. Historically, this type of sanction or restraint to accomplish the purposes of the Act has not been regarded as punishment but regulatory and is more akin to those laws consistently held to be civil in nature applicable to the 'sexual psychopaths.' Also this is true of laws involving loss of liberty by restraint of many mentally ill persons in mental hospitals in all of the states. The Maryland Act does not come into play on a finding of 'scienter,' because the person involved must before referral for diagnosis, already have been convicted of at least one criminal act and can be determined to be a 'defective delinquent' only after there has been an intensive mental examination. The law on its face clearly shows that it was not enacted to promote the aims of punishment, retribution and deterrence, but its only purpose is for the protection of society, and the treatment of the individual to effectuate a cure if at all possible. The Act clearly demonstrates that 'de-

fective delinquency' is not a crime but is a mental condition that can only be diagnosed and determined to exist after a finding of guilt. There exist alternate purposes which are valid functions of the State as a part of its police power. They are the protection of society, coupled with a humanitarian attempt to treat, cure and rehabilitate those suffering from abnormal mental functioning. The sanctions or incarceration provided by the Act are not excessive in relation to these alternative purposes since most reputable psychiatrists agree that treatment cannot be related to a fixed period of confinement, as the length of time necessary for treatment and cure, if it can be obtained, is uncertain. In addition, experience has demonstrated that the indeterminate confinement is itself therapeutic, as it has a tendency to generate and motivate the individual to participate in the institutional program in order to help himself.

Based on the testimony, we fear that without the indeterminate provision in the Act, violence would be done to its basic concepts and purposes, and much of the good sought by this legislation would go for naught. The very qualities making up the nature of an individual at Patuxent, with his warped attitudes and distorted outlook, would dictate to him that he antisocially wait out his allotted time, resisting introspection and any kind of reappraisal of his makeup, and refusing to cooperate in receiving available therapy to any degree that would give promise of his ultimate rehabilitation.

We find that on the basis of present psychiatric and psychological knowledge, it can be accurately predicted that certain individuals will commit crimes. In cases where it is believed that a person at Patuxent still maintains his propensity for crime, it would be a tragic destruction of the purposes of this legislation, a disservice to society and not the least of the errors, a serious injustice to the individual to release him, uncured.

> We therefore conclude that the Maryland Defective Delinquent Act is civil in nature under either test; that is, such a conclusion results from the legislative history and also the Act on its face supports this finding after taking into account the tests laid down by the Supreme Court in *Kennedy*."

Petitioners' reliance on *Specht v. Patterson*, 386 U.S. 605, (1967) is misplaced, as the statute involved did not provide for any notice or hearing as in *Minnesota ex rel. Pearson v. Probate Court, supra*, where there was an opportunity for hearing, representation by counsel and compulsion for production of witnesses.

Likewise, reliance on *Skinner v. Oklahoma*, 316 U.S. 535 (1942) is inapposite. There were no provisions for hearings in *Skinner, supra*, as there are under Article 31B. *Baxstrom v. Herold*, 383 U.S. 107 (1966), is distinguishable from the Act. *Baxstrom* involved a statutory procedure under which a person could be civilly committed following the expiration of a prison sentence without a jury review which was available to all others who were civilly committed. This decision is not directed at the Maryland Act, which provides all the protections which were absent in *Baxstrom*. *Holm v. Wyoming*, 404 P. 2d 704 (1965) is similarly inapplicable. That case held that the part of a Wyoming statute pertaining to mentally ill persons which provides that the court should not be bound at all by rules of evidence would totally abolish court procedures and was, therefore, void. The Circuit Court did not pass on the correctness of the Wyoming Court's decision but readily distinguished that case from ours for the reason that, contrary to the Wyoming law under attack, Article 31B does not abolish rules of evidence or court procedure but carefully preserved them.

B. The Applicability of the Self-Incrimination Clause of the Fifth Amendment.

Petitioners contend that patients at Patuxent Institution lose their Fifth Amendment privilege against self-incrimination during the examination procedures.

> "The proceeding is not accusatorial; it is not designed to elicit evidence or proof of guilt, for the patient has already been convicted. The purpose is to determine the appropriate type of punishment or treatment." *Sas, supra,* 295 F. Supp. at 409.

This contention was clearly answered by the Court of Special Appeals of Maryland in *Wise v. Director,* 1 Md. App. 418, 238 A. 2d 692 (1967), cert. denied *Wise v. Boslow,* 390 U.S. 1030, 88 S. Ct. 1420, 20 L. Ed. 2d 286 (1968), where that court held that the examinations did not constitute the type of in custody interrogation which was discussed in *Miranda v. Arizona,* 384 U.S. 436 (1966). The purpose of the examinations are ". . . not to determine or to gain evidence to prove that the subject has committed a crime, but rather to discover the inmate's mental and emotional condition. Defective delinquency proceedings are civil in nature, *Director v. Daniels;* 243 Md. 16 (1966) and as the applicant's statements did not subject him to criminal liability, there is no constitutional infirmity in the manner in which the examination at Patuxent was conducted. . . ." *Wise v. Director, supra,* at 422.

Further, the Fourth Circuit in *United States v. Albright,* 388 F. 2d 719 (4th Cir., 1968) also held that there was no constitutional right to have an attorney present during a psychiatric examination, stating:

> "It is difficult to imagine anything more stultifying to a psychiatrist, as dependent as he is upon the cooperation of his patient, than the presence of a lawyer objecting to the psychiatrist's questions and ad-

> vising his client not to answer this question and that." *Tippett, supra,* 436 F. 2d at 1158.

The Fourth Circuit further held that counsel at the examination was not presently an absolute requirement of the due process clause. *Tippett, supra,* 436 F. 2d at 1158. The District Court also held that no constitutional right was violated. *Sas, supra,* 295 F. Supp. at 410.

Petitioners' right to remain silent is not infringed and the District Court found that no resort to punitive measures occurs when the patient refuses to submit to examination, and found no constitutional deprivation. *Sas, supra,* 295 F. Supp. at 410-411 (J.A. 4, 217-223).

The District Court held that the examination was " '. . . not to determine or to gain evidence to prove that the subject has committed a crime, but rather to discover the inmate's mental and emotional condition' " and that the right not to incriminate oneself is not violated *per se* by requiring him in an appropriate case to submit to a mental examination. *Sas, supra,* 295 F. Supp. at 411; *United States v. Albright, supra,* at 723-724.

> "This court accordingly holds that the examination procedures at Patuxent do not violate any right against self-incrimination. This Court entertains no doubt as to this conclusion; but were there any question it would not make the Maryland Act unconstitutional. An objection, if valid, could be made at the time of any later attempt to use such information in any proceeding to convict for crime." *Sas, supra,* 295 F. Supp. at 413.

The record clearly substantiates the fact that the Institution itself does not attempt to use any information gained from the patient in further criminal proceedings (J.A. 4, 204). Counsel for the State have found no case which indicates that any statements made during examination to

determine whether or not an individual is a defective delinquent were ever used in any criminal proceeding against the alleged defective delinquent and the State submits that the same would be inadmissible under *Miranda v. Arizona, supra.*

C. The Applicability of the Confrontation Clause of the Sixth Amendment.

The District Court stated that in strictly criminal cases confrontation was not always necessary where the accused had an opportunity to rebut findings and could have subpoenaed witnesses.[1] *Pointer v. Texas,* 380 U.S. 400, 407 (1965); *Gonzales v. United States,* 364 U.S. 59, 64, 66 (1960); *Sas, supra,* 295 F. Supp. at 407. The Court of Appeals of Maryland in *Brunson v. Director,* 239 Md. 128, 130, 210 A. 2d 372 (1965), held that there was no denial of the right of confrontation, especially where the patient had the right to subpoena witnesses. Although Petitioners contend this is an empty right, the fact remains that counsel for a patient has, prior to the defective delinquency hearing, access to all records from Patuxent Institution from which he may glean

[1] See note, "Confrontation and the Hearsay Rule," 75 Yale L.J. 1434: "Despite the superficial similarity between the evidentiary rule and the constitutional clause, the Court should not be eager to equate them. Present hearsay law does not merit a permanent niche in the Constitution; indeed, its ripeness for reform is a unifying theme of evidence literature. From Bentham to the authors of the Uniform Rules of Evidence, authorities have agreed that present hearsay law keeps reliable evidence from the courtroom. If Pointer has read into the Constitution a hearsay rule of unknown proportions, reformers must grapple not only with centuries of inertia but with a constitutional prohibition as well." Id., at 1436 (cited with approval in *Dutton v. Evans,* 400 U.S. 74, 87 (1971); see also *California v. Green,* 399 U.S. 149, 161 (1970), wherein this court referred to the need for the "trier of fact [to have] a *satisfactory* basis for evaluating the truth of the prior statement" (emphasis added). The type of hearsay evidence involved in the present case in no way differs from that which this court recently sanctioned in *Richardson v. Perales,* 402 U.S. 389 (1971).

the names of any person responsible for contributing to the Institution's reports. Counsel also has all the discovery procedures permitted under the Maryland Rules in civil cases with which to adequately enforce the right to confrontation. *Sas, supra,* 295 F. Supp. at 408; Maryland Rules of Procedure, Sections 400-425.

> "These statutory and judicially recognized safeguards fully protect the right, if any, of a party to a defective delinquency hearing to a confrontation of witnesses against him." *Sas, supra,* 295 F. Supp. at 408.

Petitioners quote from the "Maryland Defective Delinquency Law" (J.A. 4, 501) and omit the first part of the cited paragraph to establish that most of the facts leading the staff to make a determination are pure hearsay. The whole quote is as follows:

> "Clearly, this is not the intent of the law. If we had tests of emotional balance similar to tests of intelligence, where we could determine reasonable cutting scores below which an individual could be said to be sufficiently emotionally unbalanced to be considered a defective delinquent, our task would be considerably simplified. However, no such tests are available, although of course there are several which are of great value in estimating the extent of emotional unbalance in many cases. In the final analysis, we must rely quite heavily on case history criteria and on clinical impressions regarding the individual. Such impressions are not always as easily defended in court as objective, standardized measures and it is hoped that such measures will be derived in the future." (J.A. 4, 501-502.)

What the Director meant was that the objective tests which can effectively measure intelligence are not available for determining emotional unbalance; however, his reference to clinical impressions clearly means the per-

sonal interviews and personal testing performed by the staff during the evaluation. Further, this article, written in 1959, does not include the new testing procedures which the Institution has developed.

D. The Availability of Treatment at Patuxent.

That treatment is available to all patients at Patuxent Institution is beyond question and has been so found by the courts that have considered this question. *Director v. Daniels, supra,* 243 Md. at 60-61; *Sas, supra,* 295 F. Supp. at 416; *Tippett, supra,* at 416.

> "All patients are afforded an opportunity to receive such therapy, and non-participation is due either to recent commitment, improper attitude or outright refusal." *Director v. Daniels,* 243 Md. at 61.
>
> "Although Patuxent deals with the 'least promising' or 'most difficult kind of patient,' Patuxent has a favorable parole record, particularly in view of its strict parole provisions, and extended parole time." *Sas, supra,* 295 F. Supp. at 417 (Citations to footnotes omitted.)

Petitioners next contend that there is no preliminary hearing to decide whether an individual referred to Patuxent will be aided by or susceptible to treatment. Such a contention is contrary to the findings of the courts that all persons within the definition are treatable although not all are curable (J.A. 4, 313, 328, 342, 344). These findings that treatment exists and that all are susceptible to treatment renders this contention meaningless, especially in light of the history and purposes of the Act as reported in *Research Report No. 29, supra,* which stated that the purposes of Article 31B were to identify, remove from society and treat those found to be within the purview of the definition. A determination as to whether treatment would be effective would require the same type of examinations

as are currently being performed under Section (7) of the Act.

Although citing *McDonough v. Director*, 229 Md. 626, 183 A. 2d 368 (1962) for the proposition that treatment is available only when appropriate, the testimony before the District Court indicated that the Director and staff at Patuxent Institution recognize that confinement without treatment would be patently unconstitutional[2] (J.A. 4, 293.)

---

[2] Amicus, the Prison Research Council at the University of Pennsylvania Law School, in its Brief, citing from *McCray, et al. v. State of Maryland* (Misc. Petition No. 4263, et al., Circuit Court for Montgomery and Howard Counties, November 11, 1971), now pending appeal before the Court of Appeals, cites that opinion as stating that there is ineffectual specialized treatment at Patuxent; that there are no written rules or regulations for inmate conduct, disciplinary procedures and other operating procedures and a description by one of the judges that there is no treatment.

What Amicus failed to state is that the court in *McCray, supra*, was concerned solely with disciplinary procedures and procedures used in the administrative segregation and punitive segregation areas of Patuxent Institution, and heard no testimony regarding the treatment program for those committed to Patuxent Institution. Specifically, the court found that the disciplinary procedures at Patuxent Institution did not conform to the evolving standards of due process which have recently been enunciated by the courts. Patuxent Institution was willing to and did change its rules and procedure in accordance with these evolving concepts.

The *McCray* court's comments regarding treatment went solely to treatment provided those in administrative segregation. Administrative segregation at Patuxent Institution is a confinement area for those who are a danger to the general population of the Institution or are in danger from those in the general population of the Institution. The court disregarded the purpose of administrative segregation and is requiring Patuxent Institution to alleviate by treatment those factors which place the individual in administrative segregation. The classic example of one in administrative segregation is a patient who commits acts of violence against another patient or has acts of violence committed upon him. There are few, if any, individuals in the administrative segregation unit for any other reason.

The gratuitous remarks by the court that Patuxent is "not a treatment center" (Amicus' Brief, p. 15) was again a comment made without basis in fact.

Amicus' reference to *Davis v. Director*, Misc. Petition No. 4410, Circuit Court for Montgomery County, December 10, 1971, is mis-

The State take exception to Petitioners' characterization of Patuxent as a *pure prison with no hope* at page 34 of their Brief. The record disproves this argument.

> "In its essence, the statute rejects the age old concept that every legally sane person possesses in equal degree the free will to choose between doing right and doing wrong. Instead, it substitutes the concept that there is a category of legally sane persons who by reason of a mental or emotional deficiency 'evidence a propensity toward criminal activity', which they are incapable of controlling. For those in the category who are treatable it would substitute psychiatric treatment for punishment in the conventional sense and would free them from confinement, not when they have 'paid their debt

---

placed. *Davis* disregarded established Maryland law from *State v. Musgrove,* 241 Md. 521 (1966), which held that the Patuxent Institution was not required to make a finding of defective delinquency without the personal interview required by the Act. The record in this case amply supports the necessity of a personal examination before a professional diagnosis may be made by a psychiatrist, psychologist or medical doctor. The State filed a petition for the issuance of a Writ of Certiorari to the Court of Special Appeals of Maryland which denied the same on January 8, 1972 but included the following illuminating language:

> "It appearing that the order sought to be reviewed was entered in apparent disregard of the clear dictates of *State v. Musgrove,* 241 Md. 521; it further appearing, however, that the order sought to be reviewed was entered in a habeas corpus proceeding, and that this Court is without jurisdiction to review orders entered in such cases, either on direct appeal, *Hudson v. Superintendent,* 11 Md. App. 253, or on certiorari, Maryland Code, Article 5, Section 21, it is this 8th day of January, 1972, ordered by the Court of Special Appeals of Maryland, that the Petition for a Writ of Certiorari to the Circuit Court for Montgomery County in the above entitled case be, and it is hereby, denied for lack of jurisdiction."

Director v. Davis, Court of Special Appeals of Maryland, Misc. No. 23, September Term, 1971.

Subsequently, in *Strickland v. Director,* in the Baltimore City Court, No. 12537, opinion dated February 1, 1972, that court held on the same facts as *Davis v. Director, supra,* that *State v. Musgrove, supra,* must be followed and the Institution was not required to file its report without a personal interview.

> to society,' but when they have been sufficiently cured to make it reasonably safe to release them. With this humanitarian and progressive approach to the problem no person who has deplored the inadequacies of conventional penological practices can complain." *Sas, supra*, 334 F. 2d at 516.

The State further excepts to the statement at page 32 of Petitioners' Brief that "their counsellors are the agents of their accusers . . .". The record shows conclusively that the staff at Patuxent Institution, guided by professional standards of responsibility, works not for the sake of punishing but rather for the sake of treatment, rehabilitation, and eventual release to society. Patuxent works as will be shown in later arguments, and these contentions are utterly frivolous. *Sas, supra*, 295 F. Supp. at 420, Footnote 79.

E. Miscellaneous Contentions.

Petitioners' other contentions in this argument deserve some answer. Petitioners' statement that the patient is powerless against a "sea of incompetent, rambling and remote evidence" is totally devoid of merit. Patuxent Institution gathers its reports from other penal institutions, state and federal agencies as well as their own interviews and testing procedures. Petitioners would have this Court believe that such information is untrustworthy when in fact the same is derived from reputable sources. Further, patients are allowed to contradict any findings of the staff and efforts are made to obtain the true version of the same. Private investigators would, in this instance, be superfluous (J.A. 4, 203-218). Petitioners' statement that the opinion of the independent psychiatrist is a feed-back of the institutional determination is incorrect and reflects on the professional competence of the independent psychiatrists.

Petitioners' contention that the original and redetermination hearings constitute double jeopardy is without merit.

The District Court found that the hearings were ". . . not a retrial of the criminal conviction, or a trial 'for the same offense.'" *Sas, supra*, 295 F. Supp. at 413. The determination is purely dispositional and the District Court held that the same did not amount to double jeopardy. *Sas, supra*, 295 F. Supp. at 414; *Director v. Daniels, supra*, at 47.

III.

THE OBJECTIVES OF THE ACT ARE SUFFICIENTLY IMPLEMENTED TO SUPPORT ITS CHARACTERIZATION AS A CIVIL PROCEDURE TO SATISFY CONSTITUTIONAL SAFEGUARDS AND PATUXENT INSTITUTION DOES PROVIDE ACTUAL TREATMENT TO DISTINGUISH IT FROM CONVENTIONAL PENAL INSTITUTIONS SO AS TO SATISFY THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Petitioners' first contention in Argument III of their Brief is that the objectives of the Act are not sufficiently implemented to characterize it as a civil procedure. This question has been fully answered in the State's Argument II.[8]

Petitioners' second contention in their Argument III relates to the elimination of other criminal safeguards. Their third contention that there is little actual treatment at Patuxent Institution was argued by Petitioners in their Arguments III and V. The State has therefore combined Petitioners' Arguments III and V in this Argument.

Miscellaneous Criminal Safeguards

The findings of the courts in *Director v. Daniels, supra; Sas, supra*, 295 F. Supp., and *Tippett, supra*, that the act is civil and the findings in *Sas, supra*, 295 F. Supp., that even

[8] Petitioners' discussion in this argument relating to the vagueness of the term "emotional unbalance" has been fully answered in the State's argument I.

if not purely civil, all procedural due process requirements are met, belies Petitioners' contention that patients at Patuxent Institution lose conventional criminal safeguards. Petitioners' reference to confrontation is discussed in State's Arguments II and IX. The right to trial by jury and to have the jury pass on the law as well as the facts is a right guaranteed under the Maryland Constitution in criminal cases only and is not a requisite in the post-adjudicatory stage of proceedings contemplated under Article 31B. Petitioners' right to bail is necessarily limited but does not raise itself to the status of a constitutional guarantee.

Petitioners' citations to *Cross v. Harris*, 418 F. 2d 1095 (D.C. Cir., 1969), and *Bolton v. Harris*, 395 F. 2d 642 (D.C. Cir., 1968) involve interpretations of the District of Columbia Sexual Psychopath Act. In *Cross, supra*, 418 F. 2d at 1102, the quotation referred to by Petitioners in their brief discusses the procedural requirements necessary for commitment under that Act. That court's citation to *Specht v. Patterson, supra*, and *Minnesota ex rel. Pearson v. Probate Court, supra*, in footnote 45, 418 F. 2d at 1102, indicates those procedural aspects which the District of Columbia Court of Appeals felt were necessary to uphold that Act. The findings below indicate that Article 31B fully meets these due process requirements.

Petitioners' rights to a speedy trial, while normally not attaching in a civil proceeding, can be tested by the writ of habeas corpus which is specifically reserved to petitioners under Article 31B to test the legality of detention if they have not, in fact, had a hearing on the issue of defective delinquency prior to the expiration of their original criminal sentence. Petitioners further state that the writ of habeas corpus is unavailable to one found to be a defective delinquent and that he must rely on the statutory provision for a redetermination hearing to which he is en-

titled under Article 31B, Section 10. The speedy "trial" problems found differ in no material respect from those found unsubstantial by this Court in *United States v. Marion*, ... U.S. ....., 30 L. Ed. 2d 468, 92 S. Ct. ..... (1971). Further, one may test, by the writ of habeas corpus, his commitment if he is not, in fact, receiving treatment.

Treatment

In *Director v. Daniels*, 243 Md. at 38, the Court of Appeals of Maryland noted the nonpenal purpose[4] and hopes behind Article 31B:

> "We conclude from the evidence before us that the legislative history of the Defective Delinquent Act clearly demonstrates that its sole objective and purpose was not penal but an effort to segregate a known group of mentally disordered people who are found guilty of criminal acts, by confining them in an institution housing only members of their group in a sole effort to protect society and provide treatment to effect, if possible, a cure of the illness. From the history it is clear that the legislative imposition of sanctions by restraining the individual results from studies that indicate that such restraint is necessary both for the protection of society and to provide medical treatment to further curative measures. In short, it is the State's effort to determine the cause of a criminal's acts and if associated with mental disorder to accomplish improvement under psychiatric supervision so that he may hopefully be released, no longer a danger to himself or society."

[4] Petitioners' recurring theme that court testimony is a major and time consuming part of the institution's activities again overlooks the fact that the Director testifies in the great majority of cases which frees the remainder of the staff to treat (J.A. Md. 739), *Sas, supra*, 295 F. Supp. at 419. The implication that treatment and rehabilitation are not a major and time consuming part of the institution's activities is contrary to the findings of the courts below.

The reformatory does not reform; the house of corrections does not correct; and the penitentiary does not make one penitent.

> "In primitive times, each individual dealt with wrongs done him as he saw fit. In taking personal revenge the retaliation, being unrestrained, frequently went far beyond the original wrong . . . As time passed, the practice of individual retaliation for wrong suffered was no longer sanctioned . . . Punishment was still meted out on the basis of retribution, but it was inflicted by the state, not by the individual wronged, and within a framework of law, not under the vague sanction of ancient traditions and customs." *Manual of Correctional Standards*, The American Correctional Association, 1969 Edition.

The only forward step in penology since the American Revolution has been that of "rehabilitation". Whenever a new concept of rehabilitation is expounded, the exponent really means that more time and more money will hopefully be spent in educational and vocational rehabilitation, that is, imparting language and manual skills to one convicted of a crime and sentenced to a penal institution.

> "In its essence, the statute [Article 31B] rejects the age-old concept that every legally sane person possesses in equal degree the free will to choose between doing right and doing wrong . . . it would substitute psychiatric treatment for punishment in the conventional sense and would free them from confinement, not when they have 'paid their debt to society', but when they have been sufficiently cured to make it reasonably safe to release them. With this humanitarian and progressive approach to the problem no person who has deplored the inadequacies of convention penological practices can complain." *Sas, supra*, 334 F. 2d at 516.

Petitioners' contention that there is no bona fide effort at treatment at Patuxent because George Creswell was

seen by a psychiatrist on only a few occasions does not mean that there is no treatment at Patuxent Institution.[5] Most of the personal interviews with the psychiatrist were purely for the purpose of evaluation. This completely overlooks the group therapy aspect of Patuxent Institution and the record below, which indicates that group therapy is the treatment of choice at Patuxent, and individual therapy is used only as a supportive device (J.A. 4, 255). As previously stated, treatment is required at Patuxent Institution (J.A. 4, 293).

The concern voiced by Petitioners that patients at Patuxent cooperate or sit is a broad oversimplification. The record below clearly illustrates that for therapy to be beneficial to one committed to Patuxent Institution, the patient must endeavor to help himself. The psychiatric testimony indicates that therapy is difficult when any patient does not actively seek help from his therapist. The findings of the courts below that the procedures at Patuxent are constitutional renders this contention untenable. The contention that a patient must rely on State psychiatric help on a take it or leave it basis is frivolous when practical considerations shown in the record are considered. Few, if any, patients could afford their own psychiatrists, and few, if any, patients could receive better help elsewhere. The District Court considered and fully explained that a private psychiatrist could not properly share and participate in the Institution's program. *Sas, supra*, 295 F. Supp. 419-420.

---

[5] As this Court commented in *McKeiver v. Pennsylvania*, ___ U.S. ___, 29 L. Ed. 2d 647, 654 (1971) after noting the "alarm over its defects", stated that its decisions "do not spell the doom of the juvenile court system or even deprive it of its informality, flexibility or speed". The State respectfully submits that occasional examples of neglect, although not as to this Petitioner, though deplorable, are not signs of a constitutionally defective structure.

Petitioners' statement that property crimes only would subject one to Patuxent Institution is answered in State's Argument IV. They request a delineation be made and the same has been made. *Sas, supra*, 295 F. Supp. 414-415.

Article 31B ". . . represents an enlightened and progressive experiment aimed at rehabilitating persons . . ." *Tippett, supra*, at 1157. Article 31B is no longer an experiment but a proven concept, staffed and run by dedicated experienced men who direct their full attentions to curing those individuals who medical science felt could never be helped (J.A. Md., 288-289, 295).

The statement that one-third of the patients were not receiving active treatment or therapy is incorrect. *Director v. Daniels, supra*, at 61. Further, those transferred by the Department of Correction to Patuxent were transferred for purposes of security only during an emergency (J.A. 4, 326 and 363). The intimation that Patuxent stops receiving referrals is incorrect. This occurred once, was directed to the Department of Corrections, also as an emergency measure, and the emergency ceased to exist shortly thereafter (J.A. 4, 355-356). Finally, group therapy is the treatment of choice at Patuxent Institution because it has been found the best method of treating defective delinquents (J.A. Md., 221, 385, 409, 631, 688, 774). See also *Director v. Daniels, supra*, at page 61.

Petitioners further misconstrue the success rate stated at trial by the Commissioner of Corrections. His statement was that one out of four people returned to the institutions, but of those serving sentences 70 to 75 percent have been locked up before (J.A. Md., 521). Petitioners overlook the fact that Patuxent Institution deals with ". . . the 'least

promising' or 'most difficult kind of patient . . .'" *Sas, supra*, 295 F. Supp. at 417.[6]

> ". . . [S]ince the effectiveness of the law [Article 31B] has now been demonstrated, I predict that most states will enact a similar statute within the next five to eight years. I further predict that 20 years hence psychiatric historians will regard this statute as one of the major accomplishments of the middle third of the 20th century." Hodges, Emory F., "Crime Prevention By The Indeterminate Sentence Law" *American Journal of Psychiatry*, 128:3, September 7, 1971 at 294.

Factual studies support this conclusion:

> "The findings show that of a total of 807 men diagnosed as defective delinquents on first admission, 263 committed post release offenses; 95 of these recidivists came from the untreated group, 111 from the partially treated group, and 57 from the fully treated group.
>
> Let us now ask how many recidivists there would have been in the same group of men if there had been no law on defective delinquents in Maryland. The fact is that 81 percent of the group adjudicated as 'not defective delinquents' did become recidivists. It seems reasonable to assume that the group committed by the courts as defective delinquents would have produced at least as high a percentage of recidivists as the group that was not committed. Without the statute, the 807 men diagnosed as defective delinquents would have served fixed sentences in the Department of Corrections. An 81 percent recidivists rate in this group would have produced 654 recidivists.
>
> The difference between the 654 recidivists expected without this law and the 263 actual recidivists is 391; this represents the approximate number of recidivists

[6] Petitioners' reference to the testimony of Vernon Pepersack that 70 to 75 percent of the individuals in the correctional system are sociopaths is incorrect. What Mr. Pepersack did say was that 70 to 75 percent of those individuals were repeaters, not sociopaths, sociopath being a term that is not equated with the definition in Article 31B. (J.A. Md., 521).

the law may be said to have prevented through June 1966. Now, nearly five years later, I estimate the number of recidivists that the law has prevented to be well over 500. .

Since the data show that the average recidivist has been convicted of several post release offenses, the number of crimes that have been definitely prevented in this group was estimated at over 1000 through June 1966.

By now this figure could easily have reached 1,500. Recalling that there are on the average several unsolved offenses for every conviction, the volume of prevented crimes would seem to be even higher. The effect of the law is of course cumulative, and each year adds a large increment to the volume of crimes that this law is preventing. FBI data on mobility of felony offenders strongly suggests that well over half of these prevented crimes would have occurred outside of Maryland. Thus the benefits of this law have accrued to many states." (Footnote omitted.) *Hodges, supra*, at 294.

Petitioners again intimate that there is no therapy at Patuxent because there is no time and no staff. This again overlooks the findings of the courts that treatment is available to all patients at Patuxent; that there are no deficiencies in staff; and, the most important factor, that Patuxent works. *Director v. Daniels, supra*, 243 Md. at 60-61; *Sas, supra*, 295 F. Supp. at 415-417.

"The interests of society and of the prison population demand the sort of innovative reappraisal of our correctional institutions, their practices and procedures, for which the Chief Justice has plead. At the very least, Patuxent is an encouraging example of one kind of approach to a solution of these difficult problems. *Time is required to appraise its ultimate effectiveness*, but there is firm foundation for hope that it will prove a material and positive step toward

> the rehabilitation of mental and emotional defectives, and the protection of society from those antisocial defectives who are beyond rehabilitation." *Tippett, supra*, 436 F. 2d at 1158. (Emphasis supplied.)

Dr. Emory F. Hodges, in his article "Crime Prevention by the Indeterminate Sentence Law" [Reprinted in full as Appendix B to the State's Brief] performed the previously quoted follow-up study of individuals released from Patuxent Institution. Dr. Hodges found, using the Federal Bureau of Investigation's Studies on Careers in Crime, that over 91 percent of serious criminal recidivists commit their violations within the first three years after release. Using as a cutoff date the year 1966, Dr. Hodges studied three groups of individuals released from Patuxent Institution. The first group were those found by the Institution to be defective delinquents but not committed; the second group were those who were committed to Patuxent Institution but not released by the Institutional Board of Review; and the third group were those paroled by the Institutional Board of Review. His figures indicate that

> ". . . [O]mitting the uncertain cases in which persons were charged with an offense but the disposition was unknown, we find that recidivism occurred in 81 percent of the untreated group, 71 percent of the partially treated group, and in only 37 percent of the fully treated group . . . The current finding that 37 percent of 156 parolees had new offenses suggests that Patuxent staff is maintaining rather consistent criteria for granting parole. These recidivist rates, as Boslow has observed:
>
> > '. . . deviate *significantly* from the anticipated national recidivism rate, which is usually quoted as between 65 percent and 70 percent. However, there is no other institution in this country comparable to Patuxent with its indeterminate parole system. When one considers the severe beha-

> viour disorders that are found in our particular population, the fact that, by definition, our population is composed of recidivists whose prognosis for successful rehabilitation would be quite guarded, these figures become even more impressive.' (Emphasis added.)
>
> It should be noted also that 80 percent of the 210 felony recidivists were released through court initiative, compared to 20 percent released on parole by the Patuxent staff. It would seem that if the judges and juries had accepted the recommendations of the staff more often, the number of recidivists would have been smaller." *Hodges, supra,* at 293-294.

Not only do these statistics indicate that Patuxent works but it further indicates that Patuxent has achieved one of its primary purposes, that of identifying those individuals who are likely to commit another crime. Hodges' findings that 81 percent of the untreated group and 71 percent of the partially treated group did, in fact, commit a new crime indicates that the criteria used by Patuxent Institution are valid.

The insistent complaint that treatment is not required under the Act or under its various interpretations overlooks the testimony before the District Court that incarceration without treatment would be unconstitutional. (J.A. 4, 293.)

The entire thread of argument throughout Petitioners' Brief is that no one cares and that no one does anything for those committed to Patuxent Institution. Petitioners dwell on the fact that incarceration will be for life. The record reflects that people do care and things are done for those committed to Patuxent Institution. Patuxent Institution is not a life sentence behind bars, but rather the only hope that Petitioners have for life in free society.

IV.

THE EIGHTH AMENDMENT PROVISION AGAINST CRUEL AND UNUSUAL PUNISHMENT IS NOT OFFENDED WHEN THE STATUTORY REQUIREMENT THAT A DEFECTIVE DELINQUENT BE AN "ACTUAL DANGER TO SOCIETY" IS BEING APPLIED TO OFFENSES AGAINST "PROPERTY" AS WELL AS VIOLENCE AGAINST PERSONS.

The apparent thrust of this contention is that there exists a well-defined group of persons, including Petitioner Murel, who were committed to Patuxent only because of "underlying criminal involvement . . . directly and solely related to property" and that this treatment at Patuxent of "non-violent" "property" offenders does not comply with this Court's teaching in *Robinson v. California*, 370 U.S. 660 (1962).

Article 31B, Section 5 requires that the individual clearly demonstrates an actual danger to society.

Petitioners' argument is based upon the untenable premise that one who commits a crime against "property" cannot, by that criminal activity or by the totality of his conduct, be considered "an actual danger to society."

Dr. Karl A. Menninger indicated that it was not possible to split hairs about what is dangerous:

> "If you break one law, if you have nerved yourself up to defy social regulations and defy the order and break one law, a sudden shift in the situation is very likely to precipitate the breaking of another law.
>
> As you very well know, in many — how many men I see and examine and sometimes treat, how many of them have said, 'if she had not screamed I wouldn't have done it'? Many prisoners start out with the idea of taking something, they are detected, they panic and then a subsequent act occurs which is very dangerous. So that if you could just do it in a classroom or academically you could say damage to property is really not a danger. I don't know whether that could

be argued because, after all — I have to think a little bit about the construction of the word danger there but certainly the possibility of the impulse to shortcut social prescription does not stop to make these fine distinctions — does not always stop to make these fine distinctions in times of crisis. It is awfully hard to say no person has ever been injured, therefore this fellow is not dangerous because . . .

. . . But a hundred break-and-enters, a man who had done a hundred or ten break-and-enters I would say it does make him dangerous because there is a kind of motor activity, there is a kind of — there is a nice scientific word, I wish I could ask one of my colleagues for it — at any rate, this motor expression that is involved in burglary and things of that kind makes even property damage a more dangerous kind of possibility for the individual himself." (J.A. Md., 323-324) (J.A. Md., 175-176, 323-325, 542, 665).

This practical psychiatric observation is augmented by prior judicial considerations of the same difficulty in drawing a distinction so as to exclude a given offense, under all circumstances, from being considered manifestation of an "actual danger to society." In *Director v. Daniels, supra*, 243 Md. at 48, 49, the Court of Appeals of Maryland observed that:

> "When this mental illness [defective delinquency] exists it is no less real because *an* outward manifestation has been an offense against property than an offense against a person." (Emphasis supplied.)

For instance, in *Cowman v. State*, 220 Md. 207, 151 A. 2d 903 (1959), one outward manifestation of "actual danger" was burglary against his employer's warehouse and safe, but other manifestations were drug or alcoholic-induced seizures and a psychiatric finding of general anger to the world. In *Palmer v. State, supra*, although one manifesta-

tion of actual danger was housebreaking, other manifestations included escape, burglary, auto theft, and an expert conclusion that he is a social menace and will be a threat to society until he commits a crime of sufficient magnitude such as murder, robbery or a sex crime, the basis of this opinion being extensively detailed. In Petitioner Murel's case, there were juvenile adjudications and adult convictions as to his attempted burglary, assault, breaking and entering, disorderly conduct, and burglary. In view of the totality of his record (Respondent's Ex. 4, District Court), the State finds highly questionable this Petitioner's allegation that his crimes relate solely to property. Common law burglary, statutory burglary, and breaking and entering in its various forms in Maryland require, as major elements, that the individual has broken and entered a dwelling house, storehouse, or other building with the intention to commit a felony therein, to wit murder, rape, etc. and/or steal monies, etc. The State is at a loss to concede that these crimes are pure property crimes involving no danger to any individual within the dwelling or who enters the dwelling subsequent to the breaking and entering. The State contends that even were the Act construed to relate to property offenses only, that the same would not be cruel and unusual punishment. *Oyler v. Boles*, 368 U.S. 448 (1962). Petitioner's citation to *Robinson v. California, supra*, does not compel the conclusion that the Act must clearly read to include those who have committed crimes against property especially in light of *McDonald v. Director*, 236 Md. 642, 204 A. 2d 563 (1964).

In *Cowman, supra*, at 212, the Court of Appeals of Maryland recognized that:

> "It may well be that there are some crimes, or series of crimes, so trivial as to pose no actual danger to society. Repeated incarcerations for being drunk and

> disorderly, for example, might threaten no actual danger to the person or property of others, but rather to the individual himself."

Where no actual danger to persons exist, the individual would not come within the definition of Article 31B, Section 5. *Cowman, supra,* at 212.

In *Sas,* the Fourth Circuit specifically requested the trial court to determine ". . .. whether the interpretation and application of the statutory requirement that a defective delinquent be found to be 'an actual danger to society' may within the eighth amendment's prohibition against cruel and unusual punishment include those whose conduct indicates no more than a danger to property rights as distinguished from violence to the person . . ." *Sas, supra,* 334 F. 2d at 509. The District Court found that ". . . the uncontradicted testimony, both before the Circuit Court and in this Court establishes that in fact Patuxent recommends commitment as a defective delinquent only in cases where the inmate is considered to be dangerous to the person. This Court therefore finds as a fact that the 'interpretation and application' of the Maryland Acts do not 'include those whose conduct indicates no more than a danger to property . . .'" *Sas, supra,* 295 F. Supp. at 415, (J.A. Md., 666, 784), (J.A. 4, 353). *Robinson v. California, supra,* at 667, held that the status of being a narcotic addict could not be punished because:

> ". . . [T]he State recognized that narcotic addiction is an illness. Indeed, it is apparently an illness which may be contracted innocently or involuntarily. We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug . . . or been guilty of *any irregular behavior* there, inflicts a cruel and unusual punishment . . ."

In attempting to treat the illness of defective delinquency,[7] the State of Maryland has a standard infinitely more stringent than "irregular behavior." Petitioner Murel and others would be hard pressed to show that their conduct is so "regular" as to be outside the State of Maryland's legitimate interests in correcting it. Such an assertion was advanced and repudiated in *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905), wherein it was said:

> " 'Whatever may be thought of the expediency of this statute, it cannot be affirmed to be, beyond question, in palpable conflict with the Constitution. Nor, in view of the methods employed to stamp out the disease of smallpox, *can anyone confidently assert that the means prescribed by the State to that end has no real or substantial relation to the protection of the public health and the public safety.*' " (Emphasis by the Court.)

V.

PETITIONERS WERE NOT DEPRIVED OF DUE PROCESS AND EQUAL PROTECTION WHEN THEY WERE DENIED LEAVE TO EMPLOY INDEPENDENT PSYCHIATRIC EXPERTS AT THE GOVERNMENT'S EXPENSE BEFORE THE DISTRICT COURT, NOR WERE THEY DENIED DUE PROCESS OR EQUAL PROTECTION WHEN THEY WERE DENIED AN INDEPENDENT PSYCHIATRIST PRIOR TO A FINDING OF DEFECTIVE DELINQUENCY BY PATUXENT INSTITUTION.

The claim of constitutional deprivation in this argument is based upon (A) the absence of an "independent" psychiatrist at trial before the District Court and (B) the ab-

---

[7] Statutory schemes and judicial sentences thereunder with far less foresight or soul-searching and with purely penal motives have been held by this Court to be non-violative of the "cruel and unusual" punishment provision. *See Graham v. West Virginia*, 224 U.S. 616 (1912). *See also Buck v. Bell*, 274 U.S. 200 (1924), not directly involving that provision. In *Trop v. Dulles*, 356 U.S. 86 (1958), this Court noted that this clause is to be simply examined in the light of the basic prohibition against inhuman treatment without regard to the subtleties of the meaning that might be latent in the word "unusual."

sence of an "independent" psychiatrist during evaluation at Patuxent Institution.

A. Absence of an "Independent" Psychiatrist before the District Court.

Petitioners' motion for leave to employ an independent psychiatric witness at the expense of the United States was filed on July 5, 1967 and a hearing was held on this issue before the District Court on July 28, 1967. The ostensive reason for independent psychiatric experts was to rehash the testimony proffered by the psychiatric experts called by the Circuit Court, by Petitioners and by Respondents in the proceedings in the Circuit Court for Prince George's County. Further, the District Court offered the following reasons for denying psychiatric expert testimony at the expense of the United States:

> "(The Court) We have several motions; the first one is a motion that the Court authorize Mr. Feissner, and presumably the same privilege would be granted to the others, to authorize him to employ independent psychiatric witnesses on behalf of the petitioners in the consolidated Sas cases.
>
> Reference is made to title 18, Section 3006(a). Whatever the status of these cases may be in the State Courts, that is, whether they are criminal or civil, there can be no question, in this Court, they are under the Civil Action procedure, and title 18, Section 3006(a) is just inapplicable.
>
> We can't even use it to pay counsel in habeas corpus cases, the ordinary ones, or to pay counsel for the time spent in representing defendants in probation revocation hearings. It definitely refers to strictly criminal proceedings.
>
> Now, in my volunteered capacity, I believe, in the past, the State has seen fit to make such assistance available in monetary form. These are, obviously, important cases, and if the State is able to make available

funds for counsel on my right to employ independent psychiatric witnesses, it would be a gracious and perhaps wise, gesture, but I can only make a suggestion, and, obviously, cannot require it.

I think it is a matter as to which an answer should promptly be given."

(Excerpt from Transcript of Proceedings before the Honorable R. Dorsey Watkins, United States District Judge, on July 28, 1967 in Civil No. 14197.)

Petitioners' first contention, that they were denied due process and equal protection when the District Court refused to appoint independent psychiatric experts for the hearing, was not raised on appeal to the Fourth Circuit and need not be considered by this Court. See *Neely v. Martin Keby Construction*, 386 U.S. 317 (1967), rehearing denied 386 U.S. 1027.

Even if the issue were appropriately preserved for review, Respondents would argue that this situation is controlled by *Britt v. North Carolina*, ... U.S. ....., 30 L. Ed. 2d 400 (1971), for similar to the *Britt* situation, the Petitioners had an informal alternative in the form of access to the Patuxent staff records and rebuttal of allegedly "incompetent" information thereunder. This informal alternative need not be perfect; it need only be meaningful.

Such testimony as proffered by Petitioners was to repeat the psychiatric testimony previously given in detail in the Circuit Court and, as the same was duplicitous, the State was unable to authorize the expenditure of funds for the same.[8]

---

[8] Included among the Court's witnesses in the Circuit Court were Dr. Manfred Guttmacher, Dr. Philip Q. Roche, Dr. Karl A. Menninger, Dr. Isadore Tuerk, Dr. Harold M. Boslow. Witnesses called by the parties were Dr. Anna Marie Rosenberg, Dr. Jerome D. Frank, Dr. Ralph Meng, Dr. Edward Schnoor and Dr. Brian Crowley. Their qualifications are set out in *Director v. Daniels, supra*, 243 Md. at 66-68 (J.A. Md., 45-48).

B. Absence of "Independent" Psychiatrist During Evaluation at Patuxent Institution.

Petitioners' second contention concerns appointment of an independent psychiatrist at the expense of the State prior to a determination by Patuxent Institution that an individual is a defective delinquent. This question was first presented in Petitioners' Brief to the Fourth Circuit and therefore is not properly before this Court. In any event, the contention in itself is unmeritorious. If one referred to Patuxent Institution is recommended for commitment as a defective delinquent, Article 31B, Section 7(d) provides that he shall in each and every case be afforded the services of an independent psychiatrist for the purposes of furnishing testimony in his behalf at the actual hearing on defective delinquency. There is no sound reason for a psychiatric witness to be available to combat or prevent a possible finding of defective delinquency and the same would be an unconscionable waste of funds as the individual may be found not to be a defective delinquent. It is only a point in time that is contested by Petitioners. At most, it is pointed out in the opinion of the Fourth Circuit affirming the District Court that to permit an independent psychiatrist to participate in the proceedings at this early stage might prove fruitful but the failure to do so does not amount to a constitutional infirmity. *Tippett, supra,* at 1157. *Timmons v. Peyton,* 360 F. 2d 327 (4th Cir., 1966), cited by Petitioners, dealt with the question of counsel at early stages of a criminal prosecution and not with the availability of an independent psychiatrist concurrently with an evaluation by the State of competency to stand trial and competency at the time of the commission of the crime. Further, *Timmons, supra,* dealt with procedural requirements at the adjudicatory stage and not at the post-adjudicatory or dispositional process.

VI.

THE PETITIONERS WERE NOT DENIED DUE PROCESS OF LAW BY REFERRAL TO PATUXENT INSTITUTION FOR EXAMINATION AND DETERMINATION AS TO THEIR STATUS AS DEFECTIVE DELINQUENTS WITHOUT NOTICE, HEARING OR ASSISTANCE OF COUNSEL.

Petitioners, after eight years of litigation, raise for the first time in this Court the question of referral to Patuxent Institution for examination and evaluation as to their status as Defective Delinquents without notice, hearing or assistance of counsel.

Following conviction of an enumerated crime under Article 31B, Section 6(a) and the imposition of an active prison sentence, an individual may be referred to Patuxent Institution for examination, the examination to be completed within six months from the time the patient is received or three months before the expiration of his sentence. Article 31B, Sections 6(c) and 7(a). A copy of the order for examination is served on the individual to be examined. Art. 31B, Section 6(b).

This Court in *Jennings v. Mahoney*, ... U.S. ....., 30 L. Ed. 2d 146, 92 S. Ct. ..... (1971), refused to strike down a statutory scheme whereby a State official, solely on the basis of accident reports and without affording the motorist a hearing on the issue of fault, could revoke his license, and noted:

> "The District Court in fact afforded this appellant such procedural due process. That court stayed the Director's suspension order pending completion of judicial review, and conducted a hearing at which appellant was afforded the opportunity to present evidence and cross-examine witnesses. Both appellant and the Director testified at that hearing. The testimony of the investigating police officer would also have been heard

except that appellant's service of a subpoena upon him to appear was not timely under the applicable court rules." *Jennings, supra*, 30 L. Ed. at 148.

The *Jennings* court dealt with the serious change of status by administrative action from driver to non-driver. In the instant case, the only change in status is a change in the *place* of incarceration.

Petitioners seek to require an evaluation before evaluation. Such a procedure is not constitutionally mandated. Petitioners' citations to *Timmons v. Peyton, supra*, and *Miller v. Blalock*, 356 F. 2d 273 (4th Cir., 1966) are not apposite. *Miller, supra*, involved an individual who was referred to a Virginia State Hospital to determine whether he was mentally competent to plead and stand trial. The finding of the hospital was that he was insane and unable to stand trial. No further action was taken and *Miller* was confined for an indeterminate period to the hospital without a hearing. The Fourth Circuit reversed the finding of the District Court and required that before *Miller* could be confined he must be given a hearing on the question of whether he was, in fact, insane and should be committed only after a judicial finding that he was insane. This is the same procedure which is required under Article 31B.

Petitioners' citation to *Kent v. United States*, 383 U.S. 541 (1966), and *In Re Gault*, 387 U.S. 1 (1967) are distinguishable. *Kent, supra*, and *Gault, supra*, did not concern themselves with the post-adjudicatory or dispositional processes. Juvenile waiver is not analogous to referral for examination as to an indiivdual's status as a defective delinquent. A request for examination may be made only after imposition of an active prison sentence upon a defendant's conviction of one of several classes of criminal offenses. Article 31B, Section 6(a).

Petitioners misconstrue the holding in *State v. Musgrove*, 241 Md. 521, 271 A. 2d 247 (1966), as to the time within which an examination must be made. Article 31B, Section 6(c) states that:

> "No such examination shall be ordered or made if the said person has been released from confinement for the particular crime or offense of which he was convicted or who is within six months of the expiration of his sentence."

Further, Section 7(a) states that

> "They shall state their findings in a written report addressed to the court, not later than six months from the date said person was received in the Institution for examination, or three months before expiration of his sentence, whichever first occurs."

These sections read together clearly indicate that the examination must be made prior to the expiration of the original criminal sentence. The holding in *State v. Musgrove, supra*, was directed solely to those referred to Patuxent Institution who refused examination. The court stated:

> ". . . [W]e are of the opinion that the order of court referring a person to Patuxent for an examination until such time as the procedures for determining whether or not such person is a defective delinquent have been completed could not be defeated by the refusal of such person to submit to the examination required by § 7(a) if the Patuxent staff cannot make its determination without it. It is clear that a person cannot complain of the action, or inaction, of others when he is the cause of the delay that ensues." *State v. Musgrove, supra*, 241 Md. at 532.

After referral, if the report is negative, the individual is returned to the Department of Corrections to complete service of his sentence with full credit given for time spent

at Patuxent. Article 31B, Section 7(a). If the examiners believe him to be a defective delinquent, he is afforded a full and prompt judicial hearing at which he is entitled to the assistance of counsel, the services of an independent private psychiatrist, and trial by jury. Article 31B, Sections 8(a), (b), (c). See also *Tippett, supra,* at 1155-1156.

Petitioners further question the looseness of "standards" which are used by the courts in referring individuals for examinations.[9] The most recent statistics showed that of the total number of persons referred to Patuxent Institution for examination since its inception, 66 percent are diagnosed as defective delinquents by the Institution. *Patuxent Institution, Annual Report,* 1971. This indicates that the referring courts are using proper guides and criteria and are not arbitrarily referring individuals for examination.

VII.

PETITIONERS WERE NOT DEPRIVED OF DUE PROCESS DURING THE EXAMINATION STAGE AT PATUXENT AND IN THE FINDINGS OF DEFECTIVE DELINQUENCY AND THE SAME WERE NOT UNRELIABLE FINDINGS OF FACT AND NOT PROCEDURALLY UNFAIR.

Petitioners, in their Argument VIII, set out what they considered to be various deprivations arising throughout the examination and commitment procedure at Patuxent Institution. The State, in their argument, have followed Petitioners' outline in order to answer contentions raised by Petitioners in this argument.

A. The Statutory Provisions

Section 7A has been amended to read as follows: "They shall state their findings in a written report addressed to

---

[9] Vague standards in discretionary dispositional process after a full scale criminal trial are not constitutionally defective. *See McGautha v. California,* 402 U.S. 183 (1971) (absence of standards in guiding jury's decision as to death penalty).

the court, not later than six months from the date said person was received in the institution for examination, or three months, before expiration of the sentence, whichever first occurs."

Petitioners continue to state that no opportunity for cross-examination exists at trial on the report submitted by Patuxent Institution.[10] The District Court found that opportunity for confrontation and cross-examination does exist and that the use of hearsay evidence contained in the report is proper. *Sas, supra,* 334 F. 2d 515; *Sas, supra,* 295 F. Supp. at 408.

B. The Fact Finding Process

Petitioners state that the staff finds it useful to go back as far as when an individual was eight years old (J.A. 4, 275). The statement by Dr. Kandel was that "[M]ost of our patients started their difficulties with the law at a very early age, somewhere between 8 and 12" (J.A. 4, 275). Any good psychiatrist or psychologist will obviously delve as completely as he can into the background of the individual being examined in order to assure that mistakes are not made. Further, the lapse of 40 to 45 days before start of formal examination is for the purpose of collecting prior background history on the individual referred to Patuxent Institution in order that the professional staff will have a basis on which to make their examinations.

The testimony below was clear that if the individual summoned to an interview reports and declines to answer or be examined, he is not subject to any disciplinary action. Only when he refuses to report may he be disciplined

[10] This is substantially the same argument used by Petitioners throughout their Brief. It has been answered more fully in State's Arguments II and IX.

for failure to obey an order of the institutional staff, *Sas, supra*, 295 F. Supp. at 411 (J.A. 4, 217-223).

C. The Adjudicative Process

Petitioners' misnomer of the diagnostic staff conference as "the adjudicative process" is enlightening. Petitioners continue to insist that a staff of some three dozen professional persons are vindictive, callous individuals who disregard anything that does not please them. Nothing could be further from the truth. When the individual enters the institution he is told of all the diagnostic procedures; he is given an opportunity to dispute all material before or at the diagnostic staff conference and any conflict of fact which cannot be resolved is indicated as such to the court (J.A. 4, 201, 202, 203, 208-209). Further, Petitioners misconstrue the testimony of what is of critical significance (J.A. 4, 275, 276), Dr. Kandel's testimony merely indicates that unverified minor offenses coupled with recent major offenses indicate persistent anti-social behaviour and that such minor offenses would not require effort to verify.

D. The Fact Gathering Process

Petitioners again misrepresent the purpose and procedures used in evaluating an individual as a defective delinquent. They make the broad statement that the fact finding process bristles with potential unreliability. Such a statement is without foundation in the record and the same is disproven by actual experience. The majority of reports used by Patuxent Institution come from official files, that is, F.B.I. reports, prior Department of Correction Reports, Juvenile Court records, prior reports of the various social service agencies, and an extensive social service history taken at the Institution from the individual, his family and associates. The majority of these reports are

made in the normal course of business by competent individuals and little if any "rumor and gossip" enters the same. The "dossier" is not compiled in secret and not permanently sealed. Access to the records by an individual's attorney is unlimited.

Petitioners show their mistrust of professional staff by the following quote from page 63 of their Brief. "The battery of tests administered to the person are capable of maladministration. Far greater dangers arise when the testing involves questions of judgment and discretion." This timeworn shibboleth rests on the following assumptions, that the professional staff is incompetent and should not be permitted to use the judgment and discretion for which they spent long years in training to develop. Succinctly stated, Petitioners do not trust psychiatrists, psychologists and social workers. The record amply demonstrates that the professional staff at Patuxent Institution is competent. See *Sas, supra*, 295 F. Supp. at 420 Footnote 79.

1. *Right to Counsel During Examination*

The District Court did not find counsel constitutionally mandated during the examination nor did the Fourth Circuit find it necessary in *United States v. Albright, supra.* See also *Sas, supra*, 295 F. Supp. at 410. Further, the Fourth Circuit held that the due process clause did not require counsel at the time of the examination. *Tippett, supra*, 436 F. 2d at 1158. Petitioners' citation to *Timmons v. Peyton, supra*, again reaffirms that counsel may not be present at a psychiatric examination. Petitioners' contention that counsel be available earlier in the examination process is again without substance. The cases cited by Petitioners all deal with the adjudicatory stage of criminal prosecutions and not with a subsequent post-adjudicatory disposition. If the individual is found not to be a defective delinquent, then

he is returned to the Department of Corrections to serve the balance of his sentence. Only at such time as he is diagnosed as a defective delinquent are further proceedings contemplated and counsel at that point has the absolute right to review the files at Patuxent Institution and Petitioners have the absolute right to a privately retained psychiatrist.

2. *Right to Assistance of Experts During Examination*

This contention again is patently frivolous. The Fourth Circuit in *Tippett, supra,* did not require either counsel or a psychiatrist during examination. The individual ultimately diagnosed as a defective delinquent has this absolute right at a point in time when the same would be effective. To allow a private psychiatrist to participate in the examination would again be an unconscionable waste of funds and would serve no useful purpose.

3. *Right to Counsel During Staff Diagnostic Conference*

This contention confuses the necessity of counsel during the adjudicatory stage of criminal proceedings and the dispositional processes. If the individual is determined to be a defective delinquent, then counsel would have the right to all the reports of the Institution including the findings of the Staff Diagnostic Conference in sufficient time to prepare for the Defective Delinquency hearing. Counsel at this point in the examination is not constitutionally mandated. *Tippett, supra,* at 1158.

E. Subsequent Judicial Proceedings

Petitioners' final contention is premised on improper diagnostic procedures used by Patuxent Institution to determine whether an individual is a defective delinquent. Petitioners state that the "argument of a curative judicial

proceeding is invalid." The findings of the courts in *Sas, supra,* 334 F. 2d, *Director v. Daniels, supra, Sas, supra,* 295 F. Supp. and *Tippett, supra,* found no invalidity in the diagnostic procedures nor has the argument that they were defective been made by the State. The judicial proceedings, as found by the courts, are proper and not constitutionally flawed.

Petitioners' contention that following a determination of defective delinquency, an independent expert would find it impossible to retrace the conclusion reached by the Institution is an unwarranted assumption. There is no limitation placed on the independent psychiatric expert as to the scope or extent of his examination. This contention once again denies the existence of professional competence.

Petitioners' final contention that staff members testifying in court cannot "wash their minds of inadmissible data" is unjustified. Petitioners are obviously referring to the data secured by Patuxent Institution from social service and other correctional agencies. This data is necessary for an informed professional to make a judgment as to a personality disorder and is the type information secured by every professional called upon to make a determination of this type either in private practice or in any mental hospital. Further, Petitioners have the right to contest all this data at trial by having those who wrote the reports subpoenaed into court or by use of the discovery procedures available under Maryland Rules 400-425.

VIII.

PETITIONERS' PRIVILEGE AGAINST SELF-INCRIMINATION IS NOT VIOLATED BY REQUIRING THEM TO SUBMIT TO AN EXAMINATION PURSUANT TO ARTICLE 31B.

This Court has recently reviewed several statutory schemes which involved, as an essential or indispensable

part of their operation, some form of "testimony" by individual citizens. See *California v. Byers*, ... U.S. ....., 29 L. Ed. 2d 9 (1972) ("stop and report" statute); *United States v. Freed*, 401 U.S. 601 (1971) (Registration of firearms).

In *California v. Byers, supra*, 29 L. Ed. 2d at 16, this Court noted that:

> "This case presents the narrow but important question of whether the constitutional privilege against compulsory self-incrimination is infringed by California's so-called 'hit and run' statute which requires the driver of a motor vehicle involved in an accident to stop at the scene and give his name and address. Similar 'hit and run' or 'stop and report' statutes are in effect in all 50 States and the District of Columbia."

Finding the privilege of self-incrimination not infringed by the California statute, this Court concluded:

> "Although identity, when made known, may lead to inquiry that in turn leads to arrest and charge, those developments depend on different factors and independent evidence. Here the compelled disclosure of identity could have led to a charge that might not have been made had the driver fled the scene; but this is true only in the same sense that a taxpayer can be charged on the basis of the contents of a tax return or failure to file an income tax form. There is no constitutional right to refuse to file an income tax return or to flee the scene of an accident in order to avoid the possibility of legal involvement." *Byers, supra*, 29 L. Ed. 2d at 21.

Byers, supra, unlike the present case, dealt with a statutory scheme fraught with a "clear and present" danger of criminal prosecution. In the Patuxent preliminary examination and afterwards there is the philosophical potential

for incriminating information to filter its way into some criminal proceeding, but Petitioners cite no instances in practice. In *United States v. Freed, supra*, this Court noted that the non-disclosure of incriminating information, as a matter of practice, is relevant in measuring the hazards of incrimination.

Balanced against the *de minimus* risk of incrimination is the indispensable need for disclosure. *See California v. Byers, supra; United States v. Freed, supra.* The record is replete with testimony that it would be unethical, to say the least, to make an examination without full inquiry into the past history of the individual. (See, for example, J.A. 4, 272-277, 296). Patuxent follows normal procedures recognized throughout the psychiatric community. The District Court found that the examinations are not accusatorial stages of criminal proceedings, did not constitute in-custody interrogation, and were not used to determine or gain evidence to prove a criminal act. They are used merely to discover the individual's mental and emotional condition. *Sas, supra,* 295 F. Supp. at 409, 411. *Wise v. Director, supra,* further stated that ". . . as the applicant's statements did not subject him to criminal liability, there is no constitutional infirmity in the manner in which the examination at Patuxent was conducted . . ." 1 Md. App. at 422. The ". . . right not to incriminate himself is not violated *per se* by requiring him, in an appropriate case, to submit to a mental examination." *United States v. Albright, supra,* at 723.

Judge Sobeloff, of the Court of Appeals for the Fourth Circuit, in his separate opinion agreed that the privilege against self-incrimination was not violated by the examinations at Patuxent Institution as ". . . the legitimate objectives of the legislation would be frustrated were inmates

permitted to refuse cooperation. Granting the inmate the right to silence would in many instances thwart the personal examinations and interviews considered indispensable in determining whether the prisoner is or is not a defective delinquent." *Tippett, supra*, 1162.

Not only is the risk minimal and the need for examination indispensable, the potential risk is one that can be handled quite adequately under present procedures, as the District Court noted in reviewing the Defective Delinquency Act.

> "This court accordingly holds that the examination procedures at Patuxent do not violate any right against self-incrimination. This Court entertains no doubt as to this conclusion; but were there any question it would not make the Maryland Act unconstitutional. An objection, if valid, could be made at the time of any later attempt to use such information in any proceeding to convict for crime." *Sas, supra*, 295 F. Supp. at 413.

The absence of any prosecution initiated through the use of statements made during the examination and the holdings in *Wise v. Director, supra*, and *Sas, supra*, 295 F. Supp., render Petitioners' contention untenable (J.A. 4, 204).

IX.

PETITIONERS' RIGHTS TO CONFRONTATION UNDER THE SIXTH AMENDMENT ARE NOT ABRIDGED BY THE HEARINGS HELD PURSUANT TO ARTICLE 31B.

In strictly criminal cases, the District Court found that confrontation was not always necessary where the accused had an opportunity to rebut findings and subpoena witnesses. *Pointer v. Texas, supra; Gonzales v. United States, supra; Sas, supra*, 295 F. Supp. at 407. The discovery procedures available and the ability of Petitioners to sub-

poena witnesses fully guarantees that there will be no denial of the right of confrontation. *Brunson v. Director, supra; Director v. Daniels, supra.*[11]

The Fourth Circuit held that the hearsay exception did not violate constitutional guarantees:

> "The answer to all of these objections is that with respect to state action repeated decisions of the Supreme Court has put it beyond the range of further debate that the 'due process' clause of the fourteenth amendment has not the effect of imposing upon the states any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal are not interfered with." *Sas, supra,* 334 F. 2d at 515. See also *Director v. Daniels, supra,* 243 Md. at 44-46; *Kay v. United States,* 255 F. 2d 476, (4th Cir., 1958), *Thomas v. Hogan,* 308 F. 2d 355 (4th Cir., 1962); *Sas, supra,* 295 F. Supp. at 408-409.

Specht v. Patterson, supra, cited by Petitioners is not apposite as notice and hearing were absent. Petitioners' contention that the hearsay exception allows introduction of past contacts with courts, law enforcement agencies including record of arrests, juvenile offenses and convictions is misleading. These are admissible only when contained in the report of Patuxent Institution to the court and then only to show past antisocial behaviour. *Walker v. Director,* 6 Md. App. 206, 258 A. 2d 900 (1969).

The admission of the Institutional Report does not violate the spirit or meaning of the Sixth Amendment to the Constitution of the United States.

---

[11] See State's Argument II.

X.

THE STANDARD OF PREPONDERANCE OF THE EVIDENCE DOES NOT VIOLATE DUE PROCESS.

The short answer to Petitioners' contention is that the Circuit Court, the Court of Appeals of Maryland, the District Court, and the Fourth Circuit, all held that the due process clause does not require the states to adopt any particular form or mode of procedure. *Sas, supra*, 334 F. 2d at 515; *Director v. Daniels, supra*, 243 Md. at 25; *Sas, supra*, 295 F. Supp. at 408-409. See also State's Argument II for the procedural safeguards afforded Petitioners.

> "The burden of persuasion is in the same category. We might all be happier had it been stated in terms of clear and convincing proof rather than in terms of a preponderance of the evidence. However meaningful the distinction may be to us as judges, however, it is greatly to be doubted that a jury's verdict would ever be influenced by the choice of one standard or the other. We all know that juries apply the preponderance standard quite flexibly, depending upon the nature of the case. In any event, in the present state of our knowledge, choice of the standard of proof should be left to the state. A legislative choice of the preponderance standard, the same standard governing civil commitments of mentally ill persons who have no history of criminality, ought not to be held in violation of due process requirements when we have no firm foundation for an evaluation of the practical effects of the choice." *Tippett, supra*, 436 F. 2d at 1158-1159.

Even within the criminal trial itself, this Court approved, in *Lego v. Twomey*, ... U.S. ....., 30 L. Ed. 2d 618 (1972), the use of the "preponderance of the evidence" test as to the proof of the voluntariness of a confession.

A determination of defective delinquency is not a finding of criminal responsibility and *In Re Winship*, 397 U.S. 358, (1970) is not applicable.[12]

XI.

PETITIONERS WERE NOT DENIED CONSTITUTIONAL GUARANTEES IN THE REVIEW PROCEDURES AND IN THE ANNUAL EXAMINATIONS BY THE INSTITUTIONAL BOARD OF REVIEW.

Article 31B, Section 10, allows a court redetermination of the issue of defective delinquency after expiration of two-thirds of the patient's sentence or two years, whichever is greater. Additional court reviews every three years thereafter provides those committed to Patuxent Institution with sufficient safeguards to test the basis of their commitment and does not violate the due process or equal protection guarantees of the constitution.

Petitioners further argue that the yearly reexamination by the Institutional Board of Review is flawed by the information contained in the original evaluation of the patient. This contention has been answered but nevertheless, the information collected during the evaluation prior to a patient's commitment to Patuxent Institution is reliable and presents the Institutional Board of Review with sufficient material along with their interview of the patient and his progress reports to determine his status within the Institution. Contrary to Petitioners' contention, the patient is given the opportunity to be heard before the Institutional Board of Review and may present whatever he feels neces-

---

[12] *In re Winship*, 397 U.S. 358 (1970) concerned a 12-year-old charged with delinquency for having taken money from a woman's purse. This Court held that ". . . [t]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute *the crime with which he is charged*," 397 U.S. at 364, and then went on to hold, 397 U.S. at 368, that this standard was applicable, too, ". . . during the *adjudicatory* stage of a delinquency proceeding."

sary. As a practical matter, the patient cannot refuse attendance at the Board of Review meetings and if he declines to appear, a member of the Board goes to see the patient to assure the Board that he is voluntarily refusing to appear.

Petitioners' final contention is that testimony by the treating psychiatrist is improper. While not the best practice, it is not as traumatic as Petitioners would have this Court believe (J.A. Md., 239-240). The District Court found that the practice of having the treating psychiatrist testify at court hearings had been eliminated at the time of the hearing in District Court and held that this practice was not illegal or improper. *Sas, supra,* 295 F. Supp. at 419 (J.A. Md., 294, 739) (J.A. 4, 317-318). The practice of refusing private psychiatrists to patients committed to Patuxent Institution is not unconstitutional nor is it bad practice. *Sas, supra,* 295 F. Supp. at 419 (J.A. Md., 556-557).

XII.

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AND THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DID NOT ERR IN FINDING THAT THE ACT WAS CONSTITUTIONAL ON ITS FACE, INTERPRETATION, APPLICATION, ADMINISTRATION AND RESULT.

Contrary to Petitioners' contention, the District Court found ". . . as a fact, and conclude[d] as a matter of law, that the Maryland Act is not only constitutional on its face, but also in its *interpretation, application, administration and results.*" *Sas, supra,* 295 F. Supp. at 420 [Emphasis supplied.] The District Court did consider the question whether the Act was civil or criminal and made its determination that not only was the Act civil (See State's Argument IIA) but that "[A]s will be seen, the Maryland Act provides all the due process requirements (See State's Argument IIA) set forth in the last quoted text language.

whether the Maryland Act be regarded as civil or criminal." [Footnote omitted] *Sas, supra,* 295 F. Supp. at 405. See also *Sas, supra,* 401-405 and *Director v. Daniels,* 243 Md. at 37-40, where the courts did consider the tests laid down in *Kennedy v. Mendoza-Martinez, supra.*

Likewise, their contentions concerning, facial constitutionality, (See State's Argument I) the self-incrimination questions, (See State's Argument IIB and XI) and the "property" offender arguments (See State's Argument IV) have been dealt with in other portions of the State's Brief.

In addition, it must be emphasized that the District Court's conclusions were not based solely upon abstract legalities; instead, they were the product of analysis of Maryland State law and particular testimony physically presented before it. In these circumstances, particularly, the District Court's conclusions ought not be disturbed. See, generally, Federal Rules of Civil Procedure, Rule 52(a); *Huddleston v. Dwyer,* 323 U.S. 232 (1944).

Part of those firm unequivocal findings of the District Court included its analysis of the effective treatment available at Patuxent. This factual finding is contrary to the entire thread of argument throughout Petitioners' Brief (See State's Argument IID) that no one cares and that no one does anything for those committed to Patuxent Institution. Petitioners dwell on the fact that incarceration will be for life. Not only does the record reflect that people do care and things are done for those committed to Patuxent Institution, but there is no one at Patuxent Institution today who was there when the Institution opened in 1955 and who has not had at least one opportunity to be free on parole. (The only exception is an individual transferred to a mental hospital who escaped from that hospital and was at large for 10 years). The State reiterates its contention

that Patuxent Institution is not a life sentence behind bars, but rather the only hope that Petitioners have for life in free society.

CONCLUSION

Our several century search to make this world more humane, even while exploring others, has directed our Nation in general and the State of Maryland in particular to ask questions about the nature and destiny of unreformed men that the legal profession alone could not answer.

The answers given by our psychiatric and sociological brethern, though possessing that degree of tentative incompleteness which limits all human endeavors, ought not be discarded or ignored by lawyers; and the effective procedures, treatment and therapy of our professional colleagues and brothers ought not to be summarily rejected because they do not readily fit into procrustean beds of common law procedures; although these procedures may be novel and unusual, they are certainly not cruel; although effective and expedient, they are certainy not unfair; although personalized, they are not incriminatory; the psychiatric process of treatment may also be the due process of law when it is constructed with concern, applied with understanding, and remedied, where misapplied, by fair procedures.

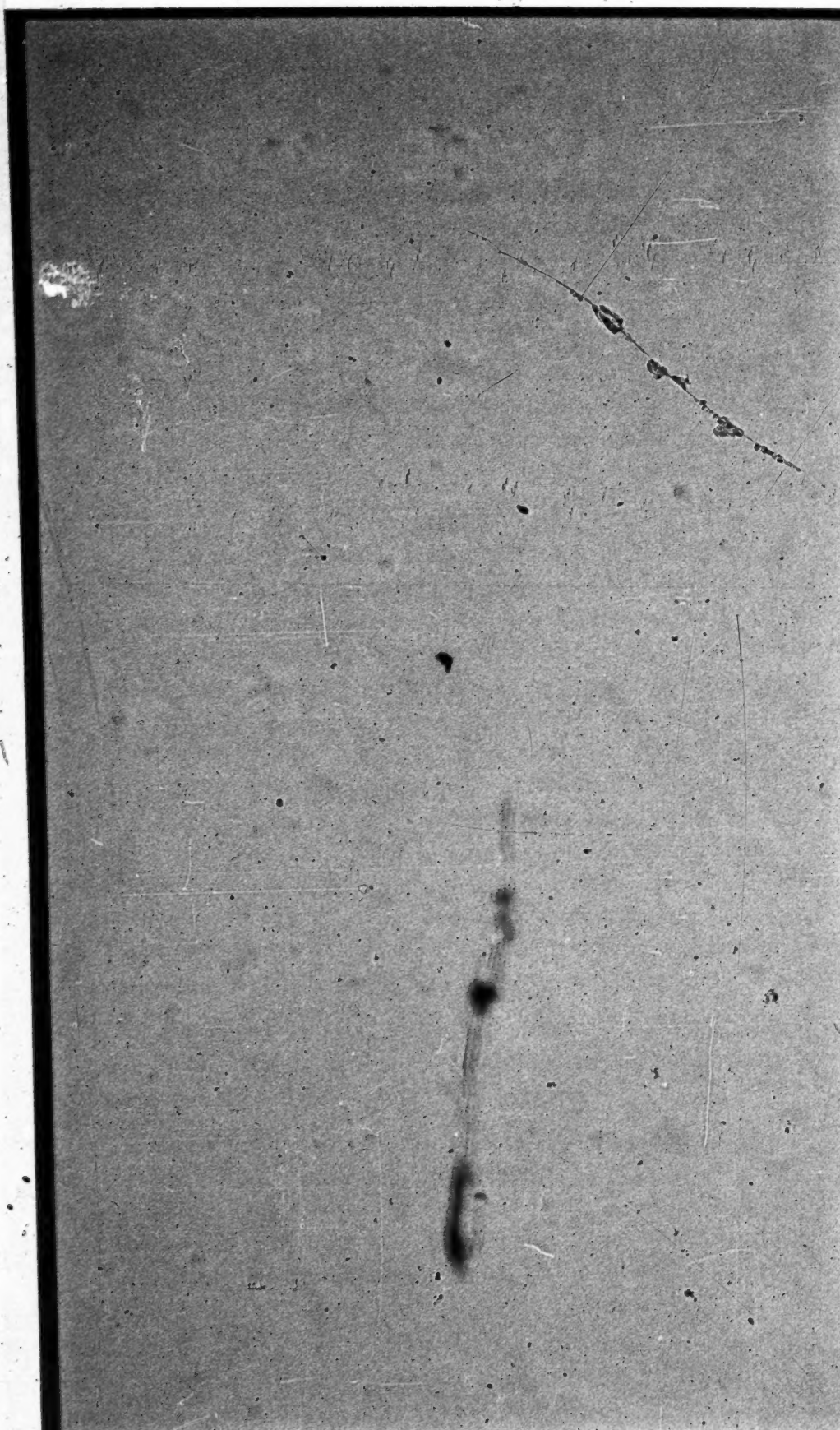
The zeal of Petitioners and Amici are eloquent proof that inevitable human errors that occur at Patuxent will not remain unnoticed but will be corrected.

These are not the beliefs of the State of Maryland alone, but are attested to by the courts, federal and state, trial and appellate, that have with concern, diligence and foresight, weighed Patuxent in the balances and found it not wanting of fairness or effectiveness.

Thus, it is respectfully submitted that the Judgment of the United States Court of Appeals for the Fourth Circuit be affirmed.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,
HENRY R. LORD,
Deputy Attorney General
of Maryland,
EDWARD F. BORGERDING,
Chief, Criminal Division
Assistant Attorney General
of Maryland,
DONALD R. STUTMAN,
Assistant Attorney General
of Maryland,
Attorneys for Respondents.



APPENDIX A

ARTICLE 31B.

DEFECTIVE DELINQUENTS.

PATUXENT INSTITUTION

§ 1. Established: board of Patuxent Institution.

(a) *Institution established; part of Department of Public Safety and Correctional Services.* — There shall be an institution for defective delinquents, with the powers and duties as provided in this article or elsewhere in the laws of this State. Said institution shall be established at Jessup, shall be known as the Patuxent Institution and shall be part of the Department of Public Safety and Correctional Services.

(b) *Board of Patuxent Institution — Powers generally; membership; appointment; terms; vacancy; removal of members; compensation.* — Subject to the authority of the Secretary of Public Safety and Correctional Services as provided for in Article 41 of this Code or elsewhere in the laws of Maryland, the board of Patuxent Institution shall possess all of the powers bestowed by law upon Patuxent Institution. The board shall consist of the chairman of the board and four associate members, who shall be appointed by the Secretary of Public Safety and Correctional Services, with the approval of the Governor and with the advice and consent of the Senate. Two of the associate members shall be appointed from the membership of the advisory board of Patuxent Institution, and one of these two associate members shall be a psychiatrist. The chairman and associate members of the board shall serve terms of four years, except that the initial term of the associate members first appointed to the board shall be one, two, three and four years respectively. Any vacancy in the board shall be filled by appointment of the Secretary of Public Safety and Correctional Services, with

the approval of the Governor, and with the advice and consent of the Senate, for the unexpired term. The Secretary, with the approval of the Governor, may remove any member of the board for inefficiency, neglect of duty, or misconduct in office, giving to such member a copy of the charges preferred and the opportunity of being first publicly heard in person or by counsel. If such member shall be removed, the Secretary of Public Safety and Correctional Services shall file in the office of the Secretary of State a complete statement of all charges made against such member, and his findings thereof, together with a complete record of the proceedings. The chairman and associate members shall serve without pay.

(c) *Same — Oath; certificate of appointment.* — Before entering upon the discharge of the duties of his office, each member of said board shall take an oath that he will well and faithfully execute and perform all and singular the duties appertaining to his office according to the laws of the State and the rules and regulations adopted in accordance therewith. The certificate of the appointment by the Governor and Secretary of Public Safety and Correctional Services of any member shall be sent to the clerk of the circuit court of the county or the clerk of the Superior Court of Baltimore City, as the case may be, where the appointee resides, and the clerk of said court shall promptly notify the appointee of the receipt of such certificate warning him that failure to take the aforesaid oath within sixty (60) days shall constitute a refusal of the appointment. The clerk shall notify the Governor of any such failure.

(d) *Same — Quorum, execution of papers.* — A majority of said board shall be a quorum for the transaction of all business, and shall have full power and authority to

do and perform any and all acts that the said board is by law authorized and empowered to do and perform; and the said board, or a majority thereof, may authorize any of its members by and in its name to execute on its behalf any and all papers that the said board has power and authority to execute.

(e) *Same — Incidental powers; witnesses.* — The board of Patuxent Institution shall have any and all incidental powers and authority appropriate and convenient to enable the said board to fully discharge the powers of management, control and supervision conferred upon them by this article. Said board shall have power to summon witnesses before it and to administer oaths or affirmations to such witnesses whenever, in the judgment of the board, it may be necessary for the effectual discharge of its duties under this article; and any person failing to appear before the board at the time and place specified in answer to said summons, or refusing to testify, shall be punishable by a fine of not less than twenty-five nor more than fifty dollars; false swearing on the part of any such witness shall be deemed perjury, and shall be punished as such.

(f) *Same — Rules and regulations,* — Said board shall have full power and authority to make, repeal or amend such rules and regulations, not inconsistent with law or applicable rules and regulations of other State agencies, for the operation, discipline and conduct of the Institution, the inmates, staff and employees, by this article placed under its supervision or control, as may be necessary or convenient for the proper administration of the power and discretion conferred upon it by this article.

(g) *Same — Interest in contracts; rewards or gifts.* — (1) No member of said board, or the advisory board hereinafter created, or any officer, member of the staff or em-

ployee of Patuxent Institution shall be directly or indirectly concerned or interested in any contract, purchase or sale made, on the recommendation of said board, or shall accept any reward or gift or any promise of any reward or gift directly or indirectly from any person interested in any contract, purchase or sale made on the recommendation of said board, and every member of said board and every officer, member of the staff or employee of Patuxent Institution shall make report to said board of all such offenses coming to his knowledge.

(2) No member of said board, or of the advisory board hereinafter created, or any officer, member of the staff or employee of Patuxent Institution, shall accept any reward or gift, or any promise of reward or gift, from any inmate in said Institution, or from anyone on his behalf, or shall receive any devise or bequest, or any promise of devise or bequest, from any such inmate, or from any person on his behalf, or shall enter into any contract with such inmate, or with any person on his behalf. All such gifts, rewards, bequests, devises, promises and contracts shall be void.

(3) Any violation of the provisions of this subsection shall be sufficient cause, in the case of a member of said board or officer of Patuxent Institution, for removal from office, and in the case of any other employee of the Institution for his dismissal. (An. Code, 1951, § 1; 1951, ch. 476, § 1; 1961, ch. 629, § 1; 1962, ch. 16; 1970, ch. 401, § 5.)

§ 2. Director.

The director shall be the chief administrative officer of the Patuxent Institution, and shall be a trained, able and competent psychiatrist with at least five years' experience in the practice or teaching of psychiatry. The director holding office at the time of the passage of this section

shall continue to hold office at the pleasure of the Secretary of Public Safety and Correctional Services. Any successor as director shall be appointed by the Secretary of Public Safety and Correctional Services from a list of three nominees proposed to the Secretary by a special committee composed of the professor of psychiatry at the Medical School of the University of Maryland, the professor of psychiatry of the Medical School of the Johns Hopkins University, the deputy secretary for correctional services, and the chairman of the board of Patuxent Institution. The secretary may reject any list of three nominees and request another list. Three members of said special committee shall be empowered in the absence of the full committee to act for the committee. The director shall receive a salary as fixed in the budget, which shall not be less than fifteen thousand dollars ($15,000.00) annually. (An. Code, 1951, § 2; 1951, ch. 476, § 2; 1961, ch. 629, § 1; 1970, ch. 401, § 5.)

§ 3. Officers and employees.

(a) *Enumeration, qualifications, duties and salaries.* — There shall be three associate directors of the said Institution. One of said associates shall be a trained, able, and competent psychiatrist of at least three years' experience in the practice or teaching of psychiatry; and one of said associates shall be a trained, able, and competent behavioral scientist of at least three years' experience in the practice or teaching of his specialty; and said associates shall assist primarily in the diagnostic and treatment duties of the Institution. The third of said associates shall be particularly charged, under the director, with the custodial duties of the Institution. There shall also be in the Institution at least three psychiatrists or clinical psychologists, at least four trained social workers (one of whom

shall be a psychiatric social worker), a physician, and a dentist, together with such other psychiatrists, psychologists, social service workers and sociologists, physicians, administrative officers, custodian, clerks, and other officers and employees as may be provided in the budget from time to time. Except as otherwise provided herein, the salaries of all officers and employees in the Institution shall be as provided in the budget.

(b) *Professional positions not included in merit system; manner of appointment.* — Persons in professional positions in the said Institution, including the associate directors and all social workers and sociologists, psychiatrists, psychologists, physicians and dentist shall be appointed by the director, subject to the approval of the board of Patuxent Institution, and shall not be included in the merit system under the provisions of Article 64A of the Annotated Code. (An. Code, 1951, § 3; 1951, ch. 476, § 3; 1957, ch. 762; 1961, ch. 629, § 1; 1969, ch. 115.)

§ 4. Advisory board; surgical operations.

(a) *Advisory board for defective delinquents.* — The advisory board for defective delinquents is hereby established as part of the Department of Public Safety and Correctional Services. It shall consist of the professor of psychiatry in the Medical School of the University of Maryland, or someone designated by him; the professor of psychiatry at the Johns Hopkins Medical School, or someone designated by him; two competent sociologists from the University of Maryland and the Johns Hopkins University, one each to be appointed by the respective presidents of these two institutions; the full-time professor of constitutional law at the University of Maryland School of Law, or if there be no such full-time professor, or if he is unable to serve, such other full-time professor

of the University of Maryland School of Law as may be designated by the dean of said school; the Director of Parole and Probation; and two practicing members of the Maryland bar, with at least five years' experience in the trial of civil and/or criminal cases, appointed by the Secretary of Public Safety and Correctional Services, with the approval of the Governor, to serve for a five-year term each. The advisory board shall organize by electing a chairman, and shall meet on the call of the chairman or of the Secretary of Public Safety and Correctional Services at least once in every three months. One of the members of the said board shall serve as secretary upon designation by the chairman and shall keep full and accurate minutes of such meetings and preserve the same. The members of the advisory board shall receive a per diem payment for every day spent in the duties of the board. The advisory board shall confer with the staff of the Institution, and with the board from time to time, and shall give to the Institution a general consultative and advisory service on problems and matters relating to its work.

(b) *Authority to perform surgical operation required.* — No surgical operation shall be performed as treatment of any defective delinquent except as authorized by the approval of the advisory board and also by the written consent of the defective delinquent, his nearest relative, or the order of the court. (An. Code, 1951, § 4; 1951, ch. 476, § 4; 1957, chs. 558, 762; 1961, ch. 629, § 1; 1970, ch. 401, § 5.)

§ 5. Defined.

For the purposes of this article, a defective delinquent shall be defined as an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emo-

tional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment. (An. Code, 1951, § 5; 1951, ch. 476, § 5; 1957, ch. 558; 1961, ch. 629, § 1.)

§ 6. Requests for examination.

(a) *For whom requests may be made.* — A request may be made that a person be examined for possible defective delinquency if he has been convicted and sentenced in a court of this State for a crime or offense committed on or after June 1, 1954, coming under one or more of the following categories: (1) A felony; (2) a misdemeanor punishable by imprisonment in the penitentiary; (3) a crime of violence; (4) a sex crime involving: (A) Physical force or violence, (B) disparity of age between an adult and a minor, or (C) a sexual act of an uncontrolled and/or repetitive nature; (5) two or more convictions for any offenses or crimes punishable by imprisonment, in a criminal court of this State. A person convicted and sentenced for a crime or offense within one of the categories listed above in this subsection, except that such crime or offense was committed before June 1, 1954, shall be subject to this article with the same effect as if said crime or offense had been committed after June 1, 1954, if after said date such person is adjudged to have broken the terms of any parole or probation on which he has been released from said sentence.

(b) *Who may make requests.* — The request for such examination may be made by the Department of Correction or by the State's attorney or assistant State's attorney who prosecuted the person for a crime or offense specified hereinabove in this section, on any knowledge or suspicion

of the presence of defective delinquency in such person. Such person himself, or his attorney in his behalf, may make such a request of the court. Whenever a request for examination comes from any such source the court may order such person to be examined by the institution for defective delinquents to ascertain if he or she is a defective delinquent. The court also may make such an order on its own initiative. A copy of any order for examination shall be served upon the person to be examined.

(c) *When requests may be made.* — Such an examination may be requested and made at any time after the person has been convicted and sentenced for a crime or offense specified hereinabove in this section, provided that the said person has been sentenced to a period of confinement in a penal institution or is then serving such a sentence. No such examination shall be ordered or made if the said person has been released from confinement for the particular crime or offense of which he was convicted.

(d) *How requests made.* — The request for such an examination shall be by petition filed with the court having custody of or jurisdiction over the said person, stating therein the reasons for suspecting or supposing the presence of defective delinquency in the said person. The court in ordering such examination shall do so by formal written order directed to Patuxent Institution. When the person to be examined is in the custody of the Department of Correction, such order shall also be directed to the Department of Correction, which shall forthwith cause the transfer of the person to the custody of Patuxent Institution.

(e) *Custody after examination ordered; jurisdiction of defendant.* — After the court has ordered an examination to be made under this section, said person shall be retained in custody, initially of the Department of Correction until

his transfer to Patuxent Institution and thereafter in the custody of Patuxent Institution, until such time as the procedures of this subtitle for the determination of whether or not said person is a defective delinquent have been completed, without regard to whether or not the criminal sentence to which he was last sentenced has expired. The court which last sentenced the defendant, whether or not the term of court in which he was sentenced has expired shall retain jurisdiction of the defendant for the purpose of any of the procedures specified in §§ 6, 7, 8 or 9 hereof, except that the Criminal Court of Baltimore City and the Circuit Court of Anne Arundel County shall for such purpose have jurisdiction of a person last sentenced by the Municipal Court of Baltimore City and the People's Court of Anne Arundel County, respectively. (An. Code, 1951, § 6; 1951, ch. 476, § 6; 1957, ch. 558; 1960, ch. 43, § 3; 1961, ch. 629, § 1; 1963, ch. 283; 1967, ch. 348.)

§ 7. Examinations.

(a) *By whom made; report of findings to court; time spent in institution, etc., credited on sentence.* — Any such examination shall be made by at least three persons on behalf of the institution for defective delinquents, one of whom shall be a medical physician, one a psychiatrist, and one a psychologist. They shall assemble all pertinent information about the person to be examined, before proceeding therewith, including a complete statement of the crime for which he has been sentenced, the circumstances of such crime, the court in which he was sentenced, the nature of the sentence, copies of any probation or other reports which may have been made about him, and reports as to his social, physical, mental and psychiatric condition and history. On the basis of all the assembled information, plus their own personal examination and study of the said person,

they shall determine whether in their opinion, or in the opinion of a majority of them, the said person is or is not a defective delinquent. They shall state their findings in a written report addressed to the court, no later than six months from the date said person was received in the Institution for examination, or before expiration of his sentence, whichever last occurs. If the substance of the report is that the said person is not a defective delinquent, he shall be retained in the custody of the Department of Correction under his original sentence as if he had not been examined for possible defective delinquency. Provided, however, that the said person shall be returned to the custody of the Department of Correction with full credit for such time as he has already spent in the institution for defective delinquents or within the custody of the Department of Correction including such allowances (or disallowances) relating to good behavior and/or work performed as the Board of Correction may determine under the provisions of § 688 of Article 27 of the Code.

(b) *Additional examinations by psychiatrist in certain cases.* — In addition to the examination provided in the foregoing subparagraph (a), whenever a request has been made to examine any person for defective delinquency, other than a request made by such person himself or by his attorney on his behalf, and whenever the court has on its own initiative ordered examination of any person, then such person shall be entitled, upon request, to be examined by a practitioner of psychiatry of his own choice for the purpose of determining whether he is a defective delinquent within the terms of this article; and the reasonable costs of such examination shall be defrayed by the State of Maryland from the appropriations to the judiciary, in such amount as may be approved by the court. The report of examination made by such psychiatrist shall

be submitted in writing addressed to the court. (An. Code, 1951, § 7; 1951, ch. 476, § 7; 1957, chs. 558, 762; 1961, ch. 629, § 1; 1963, ch. 283.)

§ 8. Hearings.

(a) *When required; defendant to be advised of right to counsel.* — If the institution for defective delinquents in its report on any person shall state that he is a defective delinquent, the court shall forthwith summon the person before it and advise him of the substance of the report and of the pendency of the hearing hereinafter provided; the court shall further advise him of his right to be represented at said hearing by counsel of his choice, or if he has no choice, by competent counsel appointed by the court.

(b) *Appointment and rights of counsel.* — Unless appearance of counsel chosen by the person is entered within twenty days following the proceeding set forth in subsection (a) hereof, the court shall appoint counsel to represent the person. Counsel for the person and for the State shall have access to all records, reports and papers of the institution relating to the person, and to all papers, in the possession of the court bearing upon the person's case, including a copy of the report of the institution.

(c) *When hearing held; jury.* — The hearing for determination of defective delinquency shall be held no less than thirty days following designation of counsel, unless acceleration of the time is requested by the person or his counsel. Upon the application of the State or of the person for a jury trial, or upon its own motion, the court shall empanel a jury of twelve persons to be selected by the court from the jurors then in attendance upon said court; or if the court is in recess, the jurors shall be selected from those in attendance at the term of court at which said

petition is heard. The court shall direct such jury after hearing to find specially, by its verdict, whether the person is a defective delinquent as defined in § 5. In the absence of request for finding by a jury, the court may make such determination sitting as judge and jury. (An. Code, 1951, § 8; 1951, ch. 476, § 8; 1957, ch. 762; 1960, ch. 43, § 3; 1961, ch. 629, § 1; 1963, ch. 283.)

§ 9. Sentence.

(a) *When defendant found not to be a defective delinquent.* — If the court or the jury, as the case may be, shall find and determine that the said defendant is not a defective delinquent, the court shall order him returned to the custody of the Department of Correction, and he shall begin or resume his period of confinement on said conviction as if he had not been examined for possible defective delinquency. Provided, however, that the said defendant shall be returned to custody under his original sentence with full credit for such time as he has already spent in the institution for defective delinquents or within the custody of the Department of Correction including such allowances (or disallowances) relating to good behavior and/or work performed as the Board of Correction may determine under the provisions of § 688 of Article 27 of the Code.

(b) *When defendant found to be a defective delinquent.* — If the court or the jury, as the case may be, shall find and determine that the said defendant is a defective delinquent, the court shall so inform the defendant, and shall order him to be committed or returned to the institution for confinement as a defective delinquent, for an indeterminate period without either maximum or minimum limits. In such event, the sentence for the original criminal conviction, or any unexpired portion thereof, shall be and remain suspended, and the defendant shall no longer be

confined for any portion of said original sentence, except as otherwise provided herein. Instead, the defendant shall thenceforth remain in the custody of the institution for defective delinquents, subject to the provisions of this article. (An. Code, 1951, § 9; 1951, ch. 476, § 9; 1957, ch. 762; 1961, ch. 629, § 1.)

§ 10. Petition for review.

(a) *Who may file; hearing and determination.* — After any person shall have been committed under § 9 (b) as a defective delinquent, shall have been confined for two years after such commitment, and shall have been confined for a total period, including any period of confinement under his original sentence prior to commitment under § 9 (b), equal to two thirds of his original sentence, such person or anyone in his behalf, including the director or any officer or employee of Patuxent Institution, may file a petition requesting that such person be brought before the court in which such petition is filed for the purpose of having the defective delinquency of such person redetermined. Such a petition may be filed in the law courts of the county or Baltimore City, as the case may be, either where such person was originally sentenced or which was the bona fide residence of such person when originally sentenced. The court shall forthwith proceed to hear and determine the matter. If the person so confined, or anyone in his behalf, shall pray a jury trial, the court shall empanel a jury of twelve persons to be selected by the court from the jurors then in attendance upon said court; or if the court is in recess, the jurors shall be selected from those in attendance at the term of court at which said petition is heard. Any party in interest shall have the right to counsel and to process to compel the attendance of witnesses. If the court or jury, as the case

may be, shall determine that such person is a defective delinquent, the court shall order said person recommitted to the institution from which he immediately came; otherwise he shall be discharged from such confinement and custody, or in the discretion of the court committed under his original sentence, less such time as he has already served in the institution for defective delinquents or within the custody of the Board of Correction, including such allowances (or disallowances) relating to good behavior and/or work performed as the Board of Correction may determine under the provisions of § 688 of Article 27 of the Code which shall apply to such person's period of commitment to Patuxent Institution with any variation of the regulations issued under said section as the Board of Correction shall consider appropriate in the particular case.

(b) *Application for further review not to be made within three years.* — After the right to apply for any such petition for review under the provisions of this section shall have been exercised once, it shall not again be sought under the provisions of this section within less than three years following the prior seeking of a petition for review from confinement under the same commitment.

(c) *Right to petition for habeas corpus not affected.* — The right to review specified in this section shall not be construed to deprive the defendant of his right to petition for habeas corpus as it might otherwise exist. (An. Code, 1951, § 10; 1951, ch. 476, § 10; 1957, chs. 378, 762; 1961, ch. 629, § 1.)

§ 11. Appeal.

From any court order issued under the provisions of § 9, or of § 10, within thirty (30) days after the passage of the order, application may be made to the Court of Special Appeals for leave to appeal from the order. The

application for leave to appeal shall be in such form as the Court of Special Appeals may, by its rules, prescribe. If the Attorney General or the State's attorney shall state an intention to file an application for leave to appeal, the order may be stayed. If the application for leave to appeal is granted, the procedure for appeal shall conform with the rules of the Court of Special Appeals. On appeal, the Court may affirm, reverse or modify the order appealed, or it may remand the case for further proceedings. If the application for leave to appeal is denied, the order sought to be reviewed shall become final. (An. Code, 1951, § 11; 1951, ch. 476, § 11; 1957, ch. 558; 1960, ch. 43, § 3; 1961, ch. 629, § 1; 1966, ch. 12, § 5.)

§ 11A. Same — Poverty of defendant.

Whenever a defendant desires to file an application for leave to appeal in order to appeal as provided in § 11, and is unable by reason of poverty to pay the cost of the application and of appeal, he may file, with the court making the order from which appeal is sought, a petition under oath alleging the fact of his poverty and his inability to defray the expense of making application and of appealing. The court upon being satisfied of the defendant's poverty shall sign an order directing that all costs, including but not limited to, all court costs, the cost of preparing the transcript of testimony, the cost of preparing and transmitting the record, and the cost of the briefs, appendices and printed record extract necessary in connection with the appeal shall be paid by the political subdivision from which the appeal is taken and that the record shall be transmitted to the Court of Special Appeals at the expense of the political subdivision. A copy of the order shall be included in the record transmitted to the Court of Special Appeals and the payment of all filing fees to the Clerk of the Court of Special Appeals in connection with the appeal

are waived. If counsel prosecuting the appeal on behalf of the defendant has been appointed as such counsel by the court making the order appealed from or by the Court of Special Appeals, the Court of Special Appeals may allow him a fee in an amount which the Court shall think proper for his services in the appeal, the fee to be paid by the political subdivision. (1960, ch. 43, § 3; 1961, ch. 629, § 1; 1966, ch. 12, § 5.)

Institutional Board of Review

§ 12. Composition; quorum; vacancy.

The institutional board of review shall consist of the director, the three associate directors, the professor of the University of Maryland School of Law who is a member of the advisory board, either of the members of the Maryland bar who are members of the advisory board and a sociologist to be appointed by the board of Patuxent Institution from the faculty of an accredited institution of higher education in Maryland. Four members, including either the professor of law or one of the members of the bar who is a member of the advisory board shall constitute a quorum. The board of Patuxent Institution if the position of director is vacant, or the director if a position of associate director is vacant, shall appoint from the staff of the Institution a substitute member of the institutional board of review to serve during the vacancy. (An. Code, 1951, § 12; 1951, ch. 476, § 12; 1961, ch. 629, § 1; 1968, ch. 144; 1970, ch. 392.)

§ 13. Duties.

(a) *Part of regular duties in Institution.* — The members of the institutional board of review and such other members of the staff whom the director shall designate to attend with the said board as advisors shall serve in such

capacity as part of their regular work and duties in the Institution.

(b) *Review and reexamination of defective delinquents.* —The institutional board of review shall review and thoroughly reexamine every person held in custodial care as a defective delinquent, not less frequently that [than] once in every calendar year. Such review and reexamination shall be to determine whether such person shall remain classified as a defective delinquent, and in making such determination the board shall assemble such information, use such tests and follow such procedures as then are being utilized to indicate the presence of defective delinquency. The board shall make a recommendation for the future status and treatment of each person so reviewed and reexamined, in writing, and a copy of every such recommendation shall be filed with the records of the Institution.

(c) *Recommendation that defective delinquent remain so classified.* — If the institutional board of review in its review and reexamination of any person shall ascertain that he should remain classified as a defective delinquent and receive further treatment as such, it shall so state in its written recommendation filed with the Institution.

(d) *Leave of absence or parole from Institution.* — If the institutional board of review as a result of its review and reexamination of any person believes that it may be for his benefit and for the benefit of society to grant him a leave of absence or parole from the institution for defective delinquents, it may proceed to arrange for such leave or parole. Any leave of absence or parole shall be granted for a period not to exceed one year. The board shall review the case before the expiration of that time and may review

it at any time during the year, in order to make further or alternate determination. The board may attach to any such leave of absence or parole such conditions as to it seem wise or necessary, including arrangements for the care and supervision of the person granted a leave or parole, by his friends or relatives, by the institution for defective delinquents or by the Department of Parole and Probation, and also including as a condition that the said person shall be steadily employed or otherwise occupied during the time of such leave or parole. The board may at any time revoke a leave or parole, or change the conditions and arrangements therefor. The board may also request the court which imposed upon the person the original sentence resulting in his being subsequently classified as a defective delinquent, to reinstate the said original sentence; and the said court is authorized and empowered following such a request to reinstate and reimpose the said original sentence, and to cause the said person to be held in custody therefor, as provided hereinbelow.

(e) *Employment outside of Institution; collection and disbursement of earnings.* — The leave of absence that may be granted by the institutional board of review may be limited to hours during which a person is suitably employed outside the Institution on such terms as are deemed fair and reasonable by the said board. The earnings from such employment shall be collected by the said board, and from them the said board shall pay to the Institution an amount deemed reasonable by the said board in the particular case for such person's board, lodging, supervision and treatment, shall pay to such person or on his behalf amounts necessary for his travel and other proper expenses outside the Institution, and shall accumulate the remainder in a fund held for such person's benefit. If such person is later granted

parole or leave of absence not limited to hours of employment the board may pay him from such fund amounts deemed necessary and proper by the board, and upon such person's unconditional release from custody, or upon his death, the board shall pay the entire remaining fund to him or his estate. If said person is later transferred to the custody of the Department of Correction, any such fund shall be transferred to the Department of Correction to be held in a separate account for said person, and shall be subject to applicable rules for the disbursement thereof as are established by the Board of Correction. While any such fund is held the board shall pay from its amounts directed to be paid by order of court for the support of such person's dependents, but the fund shall otherwise be exempt from attachment, levy, or lien, and any contract or agreement whereby such person shall purport to waive such exemptions shall be void.

(f) *When court to release from custody of Institution or grant leave of absence or parole.* — If the institutional board of review as a result of its review and reexamination of any person believes that he has sufficiently improved to warrant his unconditional release from custody as a defective delinquent, it shall so inform whatever court has jurisdiction over the person. The court then shall make such further study of such person as seems necessary, and may at its discretion summon such person before it for a further hearing, together with any witnesses whose testimony may be pertinent and together with any relevant documents or other evidence. On the basis of such reports, study and possible hearing, the court shall determine whether the person before it shall be released unconditionally from custody as a defective delinquent, released conditionally on a leave of absence or parole, returned to

the custody of the Institution as a defective delinquent, or returned to the Department of Correction, to serve the original sentence upon which he was committed prior to being classified as a defective delinquent. Upon return of a person to the custody of the Department of Correction there shall be deducted from the original sentence all time spent in the custody of Patuxent Institution and in the custody of the Department of Correction. The Department shall make such allowances or (disallowances) relating to good behavior and/or work performed as the Board of Correction may determine under the provisions of § 688 of Article 27 of the Code. Patuxent Institution shall furnish the Department of Correction with such information from the records of such person's period of confinement in the Institution as the Board of Correction shall reasonably require for determining the application of the said § 688, which shall apply to such person's period of commitment to Patuxent Institution with any variation of the regulations issued under said section as the Board of Correction shall consider appropriate in the particular case. The power of the court to provide for a leave of absence or parole for any such person before it shall be the same as that of the institutional board of review, described hereinabove in this section, except that once the person has entered upon the leave of absence or parole, the board shall have the administration of the terms and conditions of the leave or parole as set by the Court. If the person before the court is returned to the custody of the Institution as a defective delinquent, it shall continue to be for an indefinite period, without either maximum or minimum limits, subject to the review and reexamination by the institutional board of review, as provided hereinabove in this section. (An. Code, 1951, § 13; 1951, ch. 476, § 13; 1957, ch. 762; 1961, ch. 629, § 1; 1970, ch. 392.)

APPLICATION

§ 14. Not to affect juvenile courts; adults convicted in juvenile courts.

Nothing in this article shall be construed to extend to or affect any case in a juvenile court or in the court of a magistrate for juvenile causes, or any person involved in such case, unless the juvenile court judge shall have waived jurisdiction in the case so that it may be heard and adjudicated in a regular criminal court. Provided however, that the provisions of this article shall apply to any adult who has been found guilty and sentenced by one of the several juvenile courts in this State when said juvenile court is exercising its original jurisdiction as provided in §§ 53 and 55 of Article 26 of the Annotated Code of Maryland. (An. Code, 1951, § 14; 1951, ch. 476, § 14; 1959, ch. 643; 1961, ch. 629, § 1.)

§ 15. Not to affect magistrate courts; Baltimore City.

Nothing in this article shall be construed to extend to or affect any case in the court of a magistrate or justice of the peace, or any person involved in such case, unless by reason of a request for a jury trial or for other cause the case shall be heard and adjudicated in a regular criminal court. Provided, however, that the Criminal Court of Baltimore City shall have jurisdiction of a person convicted and sentenced by the Municipal Court of Baltimore City if the crime, offense, crimes or offenses, for which he has been convicted and sentenced are within one or more of the categories listed in § 6 of this article. (An. Code, 1951, § 15; 1951, ch. 476, § 15; 1961, ch. 629, § 1.)

ADMINISTRATIVE PROVISIONS

§ 16. Certain transfers between institutions.

(a) *Person sentenced for offense committed prior to June 1, 1954.* — Any person imprisoned on a sentence for a crime

or offense committed before June 1, 1954, may, by agreement between the Department of Correction and Patuxent Institution and without court proceedings, be transferred to Patuxent Institution for examination as a possible defective delinquent and, if so diagnosed, may by similar agreement be detained there for the duration of his sentence or any part thereof.

(b) *Transfer to Institution for employment.* — Any person in the custody of the Department of Correction may be transferred to Patuxent Institution for employment there by agreement between the Institution and the Department of Correction.

(c) *Diminution of sentence.* — The sentence of any person transferred to Patuxent Institution under the provisions of this section shall be subject to the same diminution for behavior, work and training as though said person had remained in the custody of the Department of Correction.

(d) *Transfer from Institution for employment, treatment or imprisonment.* — Any person in the custody of Patuxent Institution may be transferred, by agreement between the Institution and the Department of Correction, to the custody of the Department of Correction for employment on a prison farm or in any work project or for hospitalization or for other treatment for illness or for imprisonment; provided, however, that except in cases of transfer for hospitalization or treatment for illness it shall first be found by the institutional board of review that such transfer will not reduce or retard the prospect of such person's release from confinement as a defective delinquent, and provided further that such person, notwithstanding transfer, shall remain committed to Patuxent Institution and shall be returned there at least annually for reexamination

by the institutional board of review. (An. Code, 1951, § 16; 1951, ch. 476, § 16; 1953, ch. 516; 1955, ch. 244; 1961, ch. 629, § 1.)

§ 17. Supplying goods, wares, merchandise and produce to "consuming institutions."

The board of Patuxent Institution is hereby empowered to determine from time to time whether, and to what extent, persons in the custody of said Institution and selected by its director, shall supply goods, wares, merchandise and produce required to be purchased by "consuming institutions" as defined in Article 27, § 680 of the Annotated Code of Maryland. All such activities shall be conducted in accordance with the provisions of Article 27, § 680 of the Annotated Code of Maryland. (1961, ch. 629, § 1.)

§ 18. Record of inmate.

(a) *Description recorded; photograph; Bertillon method.* — Said Institution shall record or cause to be recorded a description of every person committed to it as a defective delinquent, as full and complete as may be obtainable, and shall attach thereto as part of said record a photograph or photographs of such person. For the purpose of obtaining accurate descriptions of such persons, the director is hereby authorized to adopt the Bertillon method of measurement and registration or such other method as shall be adequately descriptive.

(b) *Criminal history forwarded by State's attorney.* — In order to accomplish the purposes of subsection (a), the State's attorney of any county or city, in which any person has been found to be a defective delinquent, is hereby directed to forward promptly to said Institution and upon blanks furnished by it, a criminal history of such person as

fully as the same is known or can be ascertained by such State's attorney.

(c) *Accessibility of record; admissible in evidence.* — The record herein provided for shall not be made public except as may be necessary in the identification or trial of persons accused of crime and except as provided in this section. The record shall be accessible, however, to any officer of any court having criminal jurisdiction in this State, upon the order of the judge of said court, or of the State's attorney, which said order shall be attested by the seal of the court. Whenever, in the trial of any person, the fact of previous conviction of any person for any crime may be admissible, any such record shall be admissible in evidence for the purposes of proving the fact of the conviction and the crime for which such defective delinquent was convicted.

(d) *Copy to warden or other officer in reciprocal state.* — A copy of such record shall be furnished, upon request, to any warden or other officer in charge of a prison for felons in any other state of the United States; provided that such state has made reciprocal provisions by law for furnishing records of its convicted criminals to the authorities of this State.

(e) *Copy to police officer upon signed order.* — Said Institution shall furnish a copy of such record of any defective delinquent to any police officer presenting an order for such copy signed by the officer in charge of police of any county or municipality.

(f) *Trial data forwarded by clerk; fee.* — Whenever a person shall be convicted of crime and committed to the said Institution, the clerk of the court involved shall, unless advised by said Institution that records are available from the Department of Correction, make and forward as

soon as practicable, but not later than thirty days from time of commitment, to said Institution, a record containing, with regard to the criminal trial, a short copy of the docket entries, the name and address of the judge presiding at the trial, the State's attorney and sheriff, and the names and addresses of the jurors and the names of the witnesses sworn on the trial, together with a statement of any facts which the presiding judge may deem important or necessary for a full comprehension of the case. In each case in which he shall perform the duties required by this section, the clerk of the court shall be entitled to one dollar as compensation, which shall be taxed as a part of the costs of said case.

(g) *Interchange of records and information.* — For the purpose of increasing the efficiency in the treatment, management and rehabilitation of persons committed to said Institution there shall be full and complete interchange between said Institution and the Departments of Correction and of Parole and Probation of records and all pertinent information relating to each of the persons so committed. It shall be the duty of said Department to provide the procedures and methods for the interchange of the records and information as required by this section. (1961, ch. 629, § 1.)

§ 19. Federal grants or loans.

Upon the approval of the Board of Public Works, the board of Patuxent Institution is hereby empowered in its discretion to apply for and receive from the federal government or any board, bureau, commission, department or other agency thereof any funds, chattels, or foodstuffs by way of grant or loan that may be available to be used in the establishment, maintenance or program of the said Institution. (1961, ch. 629, § 1.)

SUPPLEMENT

ARTICLE 31B

DEFECTIVE DELINQUENTS

§ 6. Requests for examination.

(c) *When requests may be made.* — Such an examination may be requested and made at any time after the person has been convicted and sentenced for a crime or offense specified hereinabove in this section, provided that the said person has been sentenced to a period of confinement in a penal institution or is then serving such a sentence. No such examination shall be ordered or made if the said person has been released from confinement for the particular crime or offense of which he was convicted or who is within six months of the expiration of his sentence.

(e) *Custody after examination ordered; jurisdiction of defendant.* — After the court has ordered an examination to be made under this section, said person shall be retained in custody, initially of the Department of Correction until his transfer to Patuxent Institution and thereafter in the custody of Patuxent Institution, until such time as the procedures of this subtitle for the determination of whether or not said person is a defective delinquent have been completed, without regard to whether or not the criminal sentence to which he was last sentenced has expired. The court which last sentenced the defendant, whether or not the term of court in which he was sentenced has expired shall retain jurisdiction of the defendant for the purpose of any of the procedures specified in §§ 6, 7, 8, or 9 hereof, except that the Criminal Court of Baltimore City and the Circuit Court of Anne Arundel County shall for such purposes have jurisdiction of a person last sentenced by the Municipal Court of Baltimore City and the People's Court of Anne Arundel County, respectively. (1971, ch. 491.)

§ 7. Examinations.

(a) *By whom made; report of findings to court; time spent in institution, etc., credited on sentence.* — Any such examination shall be made by at least three persons on behalf of the institution for defective delinquents, one of whom shall be a medical physician, one a psychiatrist, and one a psychologist. They shall assemble all pertinent information about the person to be examined, before proceeding therewith, including a complete statement of the crime for which he has been sentenced, the circumstances of such crime, the court in which he was sentenced, the nature of the sentence, copies of any probation or other reports which may have been made about him, and reports as to his social physical, mental and psychiatric condition and history. On the basis of all the assembled information, plus their own personal examination and study of the said person, they shall determine whether in their opinion, or in the opinion of a majority of them, the said person is or is not a defective delinquent. They shall state their findings in a written report addressed to the court, not later than six months from the date said person was received in the Institution for examination, or three months, before expiration of his sentence, whichever first occurs. If the substance of the report is that the said person is not a defective delinquent, he shall be retained in the custody of the Department of Correction under his original sentence as if he had not been examined for possible defective delinquency. Provided, however, that the said person shall be returned to the custody of the Department of Correction with full credit for such time as he has already spent in the institution for defective delinquents or within the custody of the Department of Correction including such allowances (or disallowances) relating to good behavior and/or work performed as the Board of Correction may

determine under the provisions of § 688 of Article 27 of the Code. (1971, ch. 491.)

§ 9. Sentence.

(a) *When defendant found not to be a defective delinquent.* — If the court or the jury, as the case may be, shall find and determine that the said defendant is not a defective delinquent, the court shall order him returned to the custody of the Department of Correction, and he shall begin or resume his period of confinement on said conviction as if he had not been examined for possible defective delinquency. Provided, however, that the said defendant shall be returned to custody under his original sentence with full credit for such time as he has already spent in the institution for defective delinquents or within the custody of the Department of Correction including such allowances (or disallowances) relating to good behavior and/or work performed as the Board of Correction may determine under the provisions of § 688 of Article 27 of the Code. (1971, ch. 491.)

INSTITUTIONAL BOARD OF REVIEW

§ 13. Duties.

(b) *Review and reexamination of defective delinquents.* — The institutional board of review shall review and thoroughly reexamine every person held in custodial care as a defective delinquent, not less frequently than once in every calendar year. Such review and reexamination shall be to determine whether such person shall remain classified as a defective delinquent, and in making such determination the board shall assemble such information, use such tests and follow such procedures as then are being utilized to indicate the presence of defective delinquency. The board shall make a recommendation for the future status and treatment of each person so reviewed and reexamined, in writing, and a copy of every such recommendation shall be filed with the records of the Institution. (1971, ch. 15.)

APPENDIX B

Crime Prevention by the Indeterminate Sentence Law

By Emory F. Hodges, M.D.

Amer. J. Psychiat. 128:3, September 1971

This paper reports the first 11 and a half years' experience under Maryland's defective delinquent statute, which utilizes a unique approach in the treatment of dangerous offenders. The author estimates that without the law, about 1,500 additional crimes would have been committed by prisoners after their release if they had been sent to regular prisons rather than the Patuxent Institution. He believes the indeterminate sentence, which is an integral part of the statute, protects society from the defective delinquent and handles him both effectively and humanely.

In 1951 the legislature of the State of Maryland enacted a statute on defective delinquents. This law, unique in the American treatment of dangerous offenders, was based on three key features.

1. It established a procedure for the determination of a class of criminals known as defective delinquents, who are diagnosed and treated by psychiatrists and other health professionals.

2. It established the Patuxent Institution, where defective delinquents are housed in a setting that combines the security of a prison with the therapeutic milieu of a mental hospital.

3. It provided that a defective delinquent would be committed for as long as he was deemed a danger to society.

Read at the 124th annual meeting of the American Psychiatric Association, Washington, D.C., May 3-7, 1971.

Dr. Hodges is in private practice at 312 S. Washington St., Alexandria, Va. 22314.

Called an indeterminate sentence, this is analogous to the indefinite commitment of the mentally ill.

The law defines a defective delinquent as "an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment"(1).

Under the defective delinquent statute, any person may be referred for examination as a possible defective delinquent who has been convicted and sentenced in a Maryland court of record for one or more of the following: a felony; a penitentiary misdemeanor; a crime of violence; a sex crime involving force or violence, disparity of age, or acts of an uncontrolled, repetitive nature; or two or more convictions in the State of Maryland for crimes punishable by imprisonment.

From this definition two broad classes of defective delinquents may be identified: those who may be mentally and at the same time socially deficient; and those who may be described as "sociopathic personalities" — persons who are intelligent but are compulsively, repeatedly, and/or dangerously criminal in their behavior.

In the same research report (1) the intent of the Maryland legislature in passing this statute was described as follows:

> The primary purpose of such legislation is to protect society from this segment of the criminal population who will probably again commit crimes if released on

> the expiration of a fixed sentence; and thus they should be detained and specially treated unless and until cured. A secondary purpose is more effectively and humanely to handle them, which aids in the cure, where possible. A further benefit to Maryland will be the opportunity for study of the problem through the concentration in the new institution (Patuxent) of the defective delinquents under indeterminate sentence and the possibility, which has not previously existed, of obtaining our own statistics, which will be valuable in the future handling of the problem.

The defective delinquent law has rested on the assumption that a segment of the criminal population that probably would commit future crimes if released after a fixed sentence could be identified. Although the law became operative with the opening of Patuxent in January 1955, no follow-up study to confirm or refute this basic assumption had been made. Intrigued with the potential benefits both to society and the individual offender, the author in 1969 sought and was granted permission by the Board of Patuxent Institution to conduct such a study.

Method

The essence of the follow-up was to determine the number of men diagnosed as defective delinquents who committed further offenses after release from custody. As will be seen, these men fell into several legal categories. The first step therefore was to review the Patuxent files and list the names and dates of the men admitted, committed, and released.

For a follow-up to be meaningful one must allow a reasonable span of time before observing for a given phenomenon. To include men newly released from custody would create a bias. So the question of how long it takes

for most recidivists to repeat was posed. Other studies proved useful in deciding this question.

A prior study (2) on all of the 151 parolees from Patuxent through April 15, 1966, showed that of a total of 91 violators, all but two had committed their violations within three years of parole. Federal Bureau of Investigation studies on careers in crime have shown that over 91 percent of serious crime recidivists commit their violations within the first three years after release (3). Therefore the decision was made to follow up only those men who had been released from custody prior to July 1966. This ensured that every man in the follow-up had the opportunity to have been at liberty for at least three years during which time a postrelease offense might have occurred. In fact, most men had been at risk considerably longer than three years.

Next, reports were obtained from national (FBI), state, and local agencies to determine if postrelease offenses had occurred. Since the mobility of offenders is high, the FBI report was selected as the primary data source; in the few cases where these were unavailable or incomplete, state or local records were utilized. Recidivism was based on a postrelease conviction for one or more felonies and/or misdemeanors. In the many cases that showed more than one recidivist offense, the nature of the most serious offense was recorded.

Results

From the opening in January 1955 through June 30, 1966, 1,340 diagnostic evaluations were made at Patuxent. The staff recommended that 896 persons be committed as defective delinquents. Court hearings resulted in 156 findings of "not found defective delinquent" and 740 commitments as defective delinquents.

The 156 men adjudicated "not defective delinquent" were returned to the Department of Corrections to serve out their original sentences. Since they were only evaluated at Patuxent and were not exposed to the treatment program, we shall refer to these men as the "untreated" group.

Of the 740 commitments to Patuxent there were: 1) 26 men later released on legal technicalities; 2) 198 men released on subsequent court rehearings (inasmuch as these men entered the treatment program but were released by the court against Patuxent's advice, they constitute a "partially treated" group); and 3) 516 men who had court rehearings that did not result in release. Of this latter number, 156 improved enough to earn parole, while 360 others were still in confinement as of June 30, 1966. Since the Institutional Board of Review, on the recommendation of the staff, decides when a man should be granted parole, this group can be considered as "fully treated."

Using data on first admissions only, there were 129 men in the untreated group, 162 in the partially treated group, and 156 in the parole group (see table 1). Omitting the

TABLE 1

Postrelease Follow-Up

Disposition	*Untreated Group*	*Partially Treated Group*	*Fully Treated Group (Parolees)*
Convicted of new offense	95	111	57
No new offense	23	45	99
Charged, disposition unknown	11	6	—
Subtotal (men on first release)	129	162	156
Multiple releases	4	25	—
Died	4	6	—
Still confined by Department of Corrections on June 30, 1966	19	5	—
Subtotal (others)	27	36	—
Total	156	198	156

uncertain cases in which persons were charged with an offense but the disposition was unknown, we find that recidivism occurred in 81 percent of the untreated group, 71 percent of the partially treated group, and in only 37 percent of the fully treated group. A comparison of the fully treated group with the untreated and partially treated groups gives a chi square of 54 and 40 respectively. Each of these values has a probability of .01, which is, of course, statistically significant.

Of the recidivists in the untreated group, 79 had committed one or more felonies, while 16 had been convicted of misdemeanors only. Of the partially treated group, 89 were convicted of felonies and 22 of misdemeanors only. Forty-two parolees had postrelease felonies, while 15 had misdemeanors only (see table 2).

TABLE 2

Recidivism by Type of Offense

Offense	Untreated		Partially Treated		Fully Treated (Parolees)	
	No.	%	No.	%	No.	%
Felony	79	87	89	80	42	74
Misdemeanor only	16	13	22	20	15	26
Total	95		111		57	

An analysis of the types of felonies, based on the FBI crime index, appears in table 3. This index consists of personal crimes such as murder, forcible rape, robbery, and aggravated assault; and crimes against property such as burglary, larceny of goods valued at $50 or more, and auto theft. Maryland law defines larceny as a felony when the value of the stolen property is $100 or more; only such cases were scored as felonies in this study.

The felonies in the untreated group included 39 personal crimes and 40 property crimes. The partially treated

TABLE 3

Types of Felony Offenses

Item	Untreated Group	Partially Treated Group	Fully Treated Group (Parolees)
Personal offenses			
Murder, manslaughter	3	1	2
Rape	2	3	1
Robbery	11	9	6
Aggravated assault	17	14	4
Other	6	3	2
Subtotal	39(49%)	30(34%)	15(36%)
Property offenses			
Burglary	16	29	14
Larceny	8	7	5
Car theft	10	15	2
Other	6	8	6
Subtotal	40(51%)	59(66%)	27(64%)
Total	79	89	42

group had 30 personal and 59 property offenses, while the fully treated group showed 15 personal and 27 property offenses. The higher proportion of personal offenses in the untreated group compared to the partially treated group is significant at the .05 level of probability; the same comparison with the fully treated group falls short of statistical significance.

Turning now to the group of 156 parolees, we note that 99 had no new offenses. Part of this rather favorable outcome is undoubtedly due to the policy of revoking the parole of those men who have violated their parole terms. Thus of the 99 men with no new offenses, 31 had to return to the institution for further treatment. Many of these later earned parole status again. It should be mentioned

that parole is a carefully supervised experience and may include weekend furloughs, a work-out, live-in program, a study program, and a halfway house. Also among the 99 parolees with no new offenses were 30 men who had gained complete release from parole.

Reviewing the first eight years of the Patuxent Institution in 1963, Boslow (4) reported that of 81 persons paroled, only 35 percent had committed new offenses. The current finding that 37 percent of 156 parolees had new offenses suggests that the Patuxent staff is maintaining rather consistent criteria for granting parole. These recidivist rates, as Boslow has observed:

> . . . deviate significantly from the anticipated national recidivism rate, which is usually quoted as between 65 percent and 70 percent. However, there is no other institution in this country comparable to Patuxent with its indeterminate parole system. When one considers the severe behavior disorders that are found in our particular population, the fact that, by definition, our population is composed of recidivists whose prognosis for successful rehabilitation would be quite guarded, these figures become even more impressive (4).

It should be noted also that 80 percent of the 210 felony recidivists were released through court initiative, compared to 20 percent released on parole by the Patuxent staff. It would seem that if the judges and juries had accepted the recommendations of the staff more often, the number of recidivists woud have been smaller.

Discussion

The findings show that of a total of 807 men diagnosed as defective delinquents on first admission, 263 committed postrelease offenses; 95 of these recidivists came from the untreated group, 111 from the partially treated group, and 57 from the fully treated group.

Let us now ask how many recidivists there would have been in the same group of men if there had been no law on defective delinquents in Maryland. The fact is that 81 percent of the group adjudicated as "not defective delinquents" did become recidivists. It seems reasonable to assume that the group committed by the courts as defective delinquents would have produced at least as high a percentage of recidivists as the group that was not committed. Without the statute, the 807 men diagnosed as defective delinquents would have served fixed sentences in the Department of Corrections. An 81 percent recidivist rate in this group would have produced 654 recidivists.

The difference between the 654 recidivists expected without this law and the 263 actual recidivists is 391; this represents the approximate number of recidivists the law may be said to have prevented through June 1966. Now, nearly five years later, I estimate the number of recidivists that the law has prevented to be well over 500.

Since the data show that the average recidivist has been convicted of several postrelease offenses, the number of crimes that have been definitely prevented in this group was estimated at over 1,000 through June 1966. By now this figure could easily have reached 1,500. Recalling that there are on the average several unsolved offenses for every conviction, the volume of prevented crimes would seem to be even higher. The effect of the law is of course cumulative, and each year adds a large increment to the volume of crime that this law is preventing. FBI data on mobility of felony offenders strongly suggests that well over half of these prevented crimes would have occurred outside of Maryland (3). Thus the benefits of this law have accrued to many states.

The data from this study tend to confirm the assumption that it is possible to identify a segment of the criminal population that probably will commit crimes if released after a fixed sentence. The indeterminate sentence law appears to have been reasonably successful in achieving the dual purpose of protecting society from the defective delinquent while simultaneously handling him more effectively and humanely.

The Maryland legislature displayed great foresight 20 years ago in recognizing the need for obtaining its own statistics, which it thought would be valuable in the future handling of the problem. These statistical findings can benefit not only the State of Maryland but other states whose legislatures are seeking methods to decrease crime by reducing recidivism among known offenders. Even if other states were to build similar institutions at once, it would be some years before these programs could be evaluated meaningfully. Meanwhile Patuxent, with more than 16 years' experience, is able to demonstrate the long-term results of the indeterminate sentence. The pattern thus far indicates that the law is preventing a larger volume of crime each year, while the treatment program at Patuxent is significantly more effective in rehabilitating its inmates than other methods have been with this type of offender.

In January 1971 the Fourth Circuit Court of Appeals upheld the constitutionality of the defective delinquent statute, bringing closer a final decision by the Supreme Court. If the statute is again upheld, and since the effectiveness of the law has now been demonstrated, I predict that most states will enact a similar statute within the next five to eight years. I further predict that 20 years hence psychiatric historians will regard this statute as one of

the major accomplishments of the middle third of the 20th century.

Acknowledgments

This report would be incomplete without saluting the key men who produced this medicolegal tour de force. Judge Jerome Robinson, when he was serving in the state legislature, developed the concept of the indeterminate sentence in the form that eventually became law. Several psychiatrists, including Drs. Manfred Guttmacher and John Whitehorn, played major roles in urging passage of this measure. Dr. G. Kenneth Reiblich, then Professor of Law at the University of Maryland, drafted the statute after extensive research. Finally, the success that has been achieved is due in large measure to the tireless efforts of Dr. Harold Boslow, the Director of Patuxent.

References

1. An indeterminate sentence law for defective delinquents, research report 29. Baltimore, Md, Research Division, Legislative Council of Maryland, 1950.

2. Mooney P, Coan P: Parole Success and failure among "defective delinquents" at the Patuxent Institution. Baltimore, Md, Goucher College, June 3, 1969 (processed). Available upon request from Arthur Kandel, Ph.D., Patuxent Institution, Jessup, Md. 20794.

3. Hoover JE: Uniform Crime Reports for the United States. Washington, DC, US Government Printing Office, 1968.

4. Boslow HM, Kohlmeyer WA: The Maryland defective delinquency law: an eight-year follow-up. Amer J Psychiat 120:118–124, 1963.

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

Supreme Court, U. S.
FILED
MAR 17 1972
MICHAEL RODAK, JR., CLERK

October Term, 1971
No. 70-5276

ALBERT DELANOR MUREL, *Petitioner,*

vs.

BALTIMORE CITY CRIMINAL COURT AND DIRECTOR OF PATUXENT INSTITUTION, STATE OF MARYLAND, *Respondents.*

ROBERT HAYES, JR., *Petitioner,*

vs.

HAROLD M. BOSLOW, M.D., Director, Patuxent Institution, *Respondent.*

BRADLEY ARLINGTON AVEY, *Petitioner,*

vs.

STATE OF MARYLAND, HAROLD M. BOSLOW AS DIRECTOR OF PATUXENT INSTITUTION, and VERNON L. PEPPERSACK AS COMMISSIONER, STATE DEPARTMENT OF CORRECTIONS, *Respondent.*

GEORGE L. CRESWELL, *Petitioner,*

vs.

DIRECTOR, PATUXENT INSTITUTION, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

EVELLE J. YOUNGER,
Attorney General,
HERBERT L. ASHBY,
Chief Assistant Attorney General—Criminal Division,
WILLIAM E. JAMES,
Assistant Attorney General—Appeals Section,
RUSSELL IUNGERICH,
Deputy Attorney General,
WILLIAM R. POUNDERS,
Deputy Attorney General,
600 State Building,
217 West First Street,
Los Angeles, Calif. 90012,
(213) 620-4834,
Attorneys for Amicus Curiae State of California.

SUBJECT INDEX

Page

Interest of Amicus Curiae 2

Argument 3

I

The Procedures Embodied in Maryland's Defective Delinquent Statute Are Properly Characterized as Civil in Nature and Do Not Offend Basic Constitutional Protections 3

II

The Standard of Proof by a Preponderance of the Evidence in Commitment Proceedings Does Not Violate the Protection of Due Process of Law 9

Conclusion 15

Appendix. Applicable Provisions of California's Welfare and Institutions Code ..... App. p. 1

TABLE OF AUTHORITIES CITED

Cases	Page
Bevill, In re, 68 Cal. 2d 854, 69 Cal. Rptr. 599, 442 P. 2d 699 (1968)	5, 13
Cross v. Harris, 418 F. 2d 1095 (1969)	9
Director v. Daniels, 243 Md. 16, 221 A. 2d 397 (1966)	4, 14
Gault, In re, 387 U.S. 1 (1967)	14
Gerchman v. Maroney, 355 F. 2d 302 (3rd Cir. 1966)	7, 8
Gross v. Superior Court, 42 Cal. 2d 816, 270 P. 2d 1025 (1954)	5
Hannah v. Larche, 363 U.S. 420 (1960)	11
Kennedy v. Mendoza-Martinez, 372 U.S. 144, (1963)	3
Leyva, In re, 8 Cal. App. 3d 404, 87 Cal. Rptr. 265 (1970)	5
People v. Levy, 151 Cal. App. 2d 460, 311 P. 2d 897 (1957)	7
People v. Loignon, 250 Cal. App. 2d 386, 58 Cal. Rptr. 866 (1967)	5
People v. McCracken, 39 Cal. 2d 336, 246 P. 2d 913 (1952)	6
People v. Rancier, 240 Cal. App. 2d 579, 49 Cal. Rptr. 876 (1966)	7
People v. Schaletzke, 239 Cal. App. 2d 881, 49 Cal. Rptr. 275 (1966)	6, 7
People v. Valdez, 260 Cal. App. 2d 895, 67 Cal. Rptr. 583 (1968)	13
Specht v. Patterson, 386 U.S. 605 (1967)	7
Winship, In re, 397 U.S. 358 (1970)	9
	10, 11, 12, 14

Statutes Page

Annotated Code of Maryland, Art. 31B, Sec. 6 ....6, 13
Annotated Code of Maryland, Art. 31B, Secs. 9-10 .....8, 13
California Welfare & Institutions Code, Sec. 6300 4
California Welfare & Institutions Code, Sec. 6302 6
California Welfare & Institutions Code, Sec. 6302 (a) 5, 13
California Welfare & Institutions Code, Sec. 6315 6
California Welfare & Institutions Code, Sec. 6316 6
California Welfare & Institutions Code, Secs. 6316-17 .....8, 13
California Welfare & Institutions Code, Sec. 6317 6
California Welfare & Institutions Code, Sec. 6325 6
California Welfare & Institutions Code, Sec. 6326 6
California Welfare & Institutions Code, Sec. 6327 .....6, 13
Statutes of 1967, Ch. 1667, Sec. 37, p. 4107..... 4

Textbooks

27 California Jurisprudence 2d, p. 452 7
Hodges, "Crime Prevention by the Indeterminate Sentence Law," American Journal of Psychiatry, Sept., 1971, p. 128:3 7
1 Stanford Law Review (1949), Sane Laws for Sexual Psychopaths, pp. 486, 494 .....2. 5
9 Wigmore, J., Evidence (3d Ed. 1940), p. 327 .. 10

IN THE

Supreme Court of the United States

October Term, 1971
No. 70-5276

ALBERT DELANOR MUREL,

Petitioner,

vs.

BALTIMORE CITY CRIMINAL COURT AND DIRECTOR OF PATUXENT INSTITUTION, STATE OF MARYLAND,

Respondents.

ROBERT HAYES, JR.,

Petitioner,

vs.

HAROLD M. BOSLOW, M.D., Director, Patuxent Institution,

Respondent.

BRADLEY ARLINGTON AVEY,

Petitioner,

vs.

STATE OF MARYLAND, HAROLD M. BOSLOW AS DIRECTOR OF PATUXENT INSTITUTION, and VERNON L. PEPPERSACK AS COMMISSIONER, STATE DEPARTMENT OF CORRECTIONS,

Respondent.

GEORGE L. CRESWELL,

Petitioner,

vs.

DIRECTOR, PATUXENT INSTITUTION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

Interest of Amicus Curiae

In recognition of the rapid growth of knowledge about many mental disorders short of insanity, California adopted a statute in 1937 which provided for the treatment of mentally incompetent persons not adjudged to be "insane." In 1939 California further provided for the care and treatment of "sexual psychopaths" who had been charged with the commission of a crime.[1]

As stated by petitioners herein, "The commitment hearing under the Defective Delinquent Act whether labeled civil or criminal is very similar to that under sexual psychopathic laws." (Petnr. Br. p. 74) Further, petitioners indicated that the situation of the examinee under the defective delinquent statute is comparable to that of persons suspected of being sexual psychopaths (Petnr. Br. pp. 63-64), and the *amicus curiae* brief of the Prison Research Council in support of petitioners also reports that analysis of sexual psychopathy laws applies equally to Maryland's defective delinquency laws (Amicus Br. p. 51).

---

[1]Note, *Sane Laws for Sexual Psychopaths*, 1 Stan. L. Rev. 486, 494 (1949).

ARGUMENT

I

The Procedures Embodied in Maryland's Defective Delinquent Statute Are Properly Characterized as Civil in Nature and Do Not Offend Basic Constitutional Protections

Petitioners initially contended that the Constitution requires a hearing for the suspected defective delinquent "with *all* safeguards and protection which the State affords those charged with crimes." (Petnr. Br. p. 30) However, in their argument on the self-incriminating factors in defective delinquency proceedings, petitioners significantly concede that the case is "'civil' in nature" (Petnr. Br. p. 32) and that the proceeding is "*quasi-civil*, rather than criminal" (Petnr. Br. p. 33). Again, in their argument on double jeopardy, petitioners urge its application despite "the 'civil' nature of the case." (Petnr. Br. p. 34) This significant concession on the part of petitioners is, as has been found by the lower courts, quite accurate.

The relevant considerations for a determination of the character of the proceeding as either penal or regulatory have been delineated by this Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963):

> ". . . Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it

> may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face. . . ." (footnotes omitted)

The Circuit Court applied these factors to the Maryland Defective Delinquent Statute and concluded that the only purpose was the protection of society and the treatment of the individual to effectuate a cure if at all possible. It was further concluded that "the purpose of this act is so closely akin to the so-called Sexual Psychopath laws enforced in some twenty (20) states and the District of Columbia, that the decisions of the Courts in those jurisdictions that each of their laws is civil in nature is ample authority to conclude that the Maryland Act is regulatory." *Director v. Daniels,* 243 Md. 16, 37-40 [221 A. 2d 397] (1966).'

The courts of California have consistently held California's "sexual psychopath" law to be civil in nature. That law, now applied to "mentally disordered sex offenders," provides:

> As used in this article, "mentally disordered sex offender" means any person who by reason of mental defect, disease, or disorder, is predisposed to the commission of sexual offenses to such a degree that he is dangerous to the health and safety of others. Wherever the term "sexual psychopath" is used in any code, such term shall be construed to refer to and mean a "mentally disordered sex offender." (Added Stats. 1967, c. 1667, p. 4107, § 37, operative July 1, 1969.)
>
> Cal. Welf. & Inst. Code § 6300

The mentally disordered sex offender is not legally insane and is not necessarily a sex offender because the crime of which he is convicted need not be a sex offense.[2] The proceeding for commitment is civil in nature and is collateral to the proceedings of a valid criminal conviction. Welf. & Inst. Code §6302(a); *In re Bevill*, 68 Cal. 2d 854, 858-60 [69 Cal. Rptr. 599, 442 P. 2d 679] (1968); *Gross v. Superior Court*, 42 Cal. 2d 816, 820 [270 P. 2d 1025] (1954). The reason that the Legislature restricted commitment to those charged with the commission of a crime is that court action on the criminal charge is a convenient occasion for discovering a psychopathic condition. While the symptoms of drug addiction, alcoholism, and many forms of insanity can be detected by the layman, the symptoms of "sexual psychopathy" usually can be discovered only by a trained expert.[3] When the defendant is before the court, competent experts are available to examine him.

By requiring a conviction prior to commitment, the California Legislature intended to create a "more solid safeguard to liberty." *In re Bevill, supra*, 68 Cal. 2d 854, 860 [69 Cal. Rptr. 599, 442 P. 2d 679] (1968). An invalid commitment does not fulfill that legislative goal, and the requirements of the mentally disordered sex offender law are jurisdictional. *People v. Loignon*, 250 Cal. App. 2d 386, 390 [58 Cal. Rptr. 866] (1967).

---

[2]For example, the case of *In re Leyva*, 8 Cal. App. 3d 404, 405 [87 Cal. Rptr. 265] (1970) involved a plea of guilty to battery, but the original charge was assault and attempted rape. The defendant was subsequently committed as a mentally disordered sex offender.

[3]Note, *Sane Laws for Sexual Psychopaths*, 1 Stan. L. Rev. 486, 494 (1949).

The structure of the statute manifests a continuing relation between civil commitment and criminal conviction. The criminal proceedings are adjourned when commitment proceedings commence. Welf. & Inst. Code §6302. If the subject is immediately determined not to be a mentally disordered sex offender, criminal proceedings are resumed. Welf. & Inst. Code §6315. If the subject is tentatively determined to be a mentally disordered sex offender, he is committed for 90 days and then returned to court. Upon his return, he is either finally committed or sentenced. Welf. & Inst. Code §6316. If he is committed, the committing court may require periodic reports on his status (Welf. & Inst. Code §6317) and may have the subject returned for examination at six-month intervals (Welf. & Inst. Code §6327). If an individual is eventually found not amenable to further treatment and not a danger to others, he is returned to court for sentencing. Welf. & Inst. Code §6325. Time spent under an indeterminate commitment is credited in determining the term of sentence. Welf. & Inst. Code §6325. If a person is found not amenable to further treatment and a continuing danger to others, he may be either recommitted or sentenced. Welf. & Inst. Code §6326.

The safeguard of this continuing relation between civil commitment and criminal conviction is predominant in the Maryland Defective Delinquent Statute also. Anno. Code of Md., Art. 31B, §6.

The primary purpose of quarantining mentally disordered sex offenders is protection of the public, because experience has shown that sexual psychopaths are unable to benefit from ordinary confinement and are in need of medical treatment. *People v. McCracken*, 39 Cal. 2d 336, 345 [246 P. 2d 913] (1952); *People*

v. Schaletzke, 239 Cal. App. 2d 881, 884 [49 Cal. Rptr. 275] (1966); 27 Cal. Jur. 2d 452. The dual interests promoted by the act are the protection of society against the mentally disordered sex offender and the rehabilitation of the offender. *People v. Rancier*, 240 Cal. App. 2d 579, 582 [49 Cal. Rptr. 876] (1966); *People v. Levy*, 151 Cal. App. 2d 460, 468 [311 P. 2d 897] (1957).

As the study made by Dr. Emory F. Hodges shows,[4] these goals are being accomplished by the Maryland provisions:

> The data from this study tends to confirm the assumption that a segment of the criminal population can be identified which probably will commit future crimes if released after a fixed sentence. The indeterminate sentence law appears reasonably successful in achieving the dual purpose of protecting society from the defective delinquent while simultaneously handling him more effectively and humanely.

The determinations that Maryland's Defective Delinquency Statute and California's mentally disordered sex offender law are civil in nature are not altered by the reasoning in *Specht v. Patterson*, 386 U.S. 605 (1967) and *Gerchman v. Maroney*, 355 F. 2d 302 (3rd Cir. 1966) relating to comparable acts in Colorado and Pennsylvania. The Colorado Sex Offenders Act provided for sentencing for an indeterminate term of one day to life without notice and a full hearing, thus resulting in "criminal punishment." *Specht, supra*, at 607-08. The Pennsylvania Barr-Walker Act provided

---

[4]Hodges, "Crime Prevention by the Indeterminate Sentence Law," American Journal of Psychiatry, 128:3, September, 1971.

for a mandatory maximum sentence of life imprisonment. *Gerchman, supra,* at 309-10. In contrast, both Maryland (Art. 31B, §§9-10) and California (Welf. & Inst. Code §§6316-17) provide commitment for an indeterminate period subject to periodic review. Both the purpose and the practice of the Maryland Defective Delinquent Statute compel the conclusion that the act is civil in nature.

Under these circumstances, the reasoning of Mr. Chief Justice (then Circuit Judge) Warren E. Burger, concurring and dissenting in part in a decision on the Sexual Psychopath Act of the District of Columbia, is particularly appropriate:

> ". . . A civil commitment statute is not rendered constitutionally suspect as a form of preventive detention simply because in a given case the civil confinement may exceed the sentence which could be imposed under a criminal statute for the same acts. The possible disparity of confinement, which is by no means inevitable, may reasonably be justified by the social desirability and public necessity of providing the patient with therapy.
>
> Admittedly there are a multitude of problems involved in determining psychological trauma to the victims and then in balancing the gravity of the harm to the public with the necessity for involuntary commitment of a delinquent or emotionally disabled offender. But these are essentially legislative policy determinations, not primarily judicial questions. Indeed, Congress, being sensitive to the fact that psychiatry is at best an infant

and developing discipline which employs imprecise and changing standards and definitions, has experimented with a variety of statutes to provide a rehabilitative system for individuals prone to aberrant sexual conduct. Since we are not here dealing with *penal* legislation we should be especially cautious of substituting our own predilections concerning psychiatry for those of a fact-finding body entrusted with formulating our legal and social policies; courts have neither the authority nor the facilities nor the competence for marshalling the data necessary to displace the policy judgments of the legislature. The approach of each of us is all too likely to be shaped by what books we read on the subjects outside our own discipline." (footnotes omitted)

Cross v. Harris, 418 F. 2d 1095, 1109 (1969).

II

The Standard of Proof by a Preponderance of the Evidence in Commitment Proceedings Does Not Violate the Protection of Due Process of Law

Relying upon the rationale of *In re Winship*, 397 U.S. 358 (1970), petitioners contend that proof beyond a reasonable doubt is required in lieu of the current civil standard applied by the Maryland courts in defective delinquent proceedings. (Petnr. Br. p. 75.) *Amicus curiae* submits that the reasonable doubt standard is peculiarly applicable to criminal cases where the issue is guilt or innocence. The civil commitment proceedings in the instant case are not criminal cases and do not involve a determination of the defendant's guilt or innocence with respect to a criminal charge.

In his treatise on the law of evidence, Professor Wigmore observed:

> ". . . the chief topic of controversy has been whether in certain civil cases the measure of persuasion for *criminal cases* should be applied. Policy suggests that the latter test should be strictly confined to its original field, and that there ought to be no attempt to employ it in any civil case. . . ."
>
> 9 J. Wigmore, *Evidence* 327 (3d Ed. 1940).

This Court's opinion in *Winship* appears to accept Professor Wigmore's position. Indeed, the *Winship* decision is itself an application of the reasonable doubt standard to a proceeding essentially criminal in nature. At the conclusion of this Court's analysis of the policy considerations supporting the reasonable doubt standard, the *Winship* opinion states:

> "Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty." (Id. at 364.)

Further portions of the *Winship* opinion reinforce the position of *amicus curiae* that this Court's decision

was an application of the criminal standard to a proceeding which had all the earmarks of a criminal case. Writing for the Court, Mr. Justice Brennan stated the issue in these words:

> "We turn to the question whether juveniles, like adults, are constitutionally entitled to proof beyond a reasonable doubt when they are charged with violation of a criminal law. The same considerations that demand extreme caution in fact-finding to protect the innocent adult apply as well to the innocent child." (Id. at 365.)

Later in the opinion, this Court held that judicial intervention for the welfare of the child ". . . cannot take the form of subjecting the child to the stigma of a finding that he violated a criminal law and to the possibility of institutional confinement on proof insufficient to convict him were he an adult." (Id. at 367.)

The foregoing quotations from the *Winship* opinion demonstrate that this Court's decision was not an application of the reasonable doubt standard to a case outside the traditional criminal sphere. The juvenile proceedings in *Winship* were, in essence, criminal because of the nature of the charges involved, and the determination of guilt or innocence.

In urging the adoption of the reasonable doubt standard in Maryland's defective delinquent proceedings, petitioners appear to link their contention to general due process standards. This Court has addressed itself to those standards in *Hannah v. Larche*, 363 U.S. 420, 442 (1960):

> "'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . . . Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account."

In analyzing the particular right involved in defective delinquent proceedings, it is readily apparent from the preceding discussion of *Winship* that the petitioners had no right to the criminal burden of proof. The Maryland commitment proceedings, as well as similar proceedings in California, do not involve a criminal charge or a determination of guilt or innocence. Rather the ultimate issue in these proceedings is whether the subject of the petition is, in fact, a defective delinquent or mentally disordered sex offender. A determination of that ultimate issue is not analogous to a criminal conviction.

In considering the nature of the proceeding involved, it has already been established that the proceedings at issue are civil in nature. Although civil, they are accompanied by safeguards not found in other proceedings utilizing the preponderance of evidence standard of proof. First, these proceedings require a valid

criminal conviction as a prerequisite to jurisdiction. Art. 31B, §6; Welf. & Inst. Code §6302(a); *See, In re Bevill, supra,* 68 Cal. 2d 854, 858-60, [69 Cal. Rptr. 599, 442 P.2d 679] (1968). In his initial criminal trial, the subject of commitment proceedings has been afforded the full panoply of rights to which he is entitled in any criminal case. These rights include the application of the reasonable doubt standard to the facts underlying the jurisdictional offense. In addition to the protection afforded by this preliminary trial on a criminal offense, the subject of commitment proceedings is further protected by provisions in the statutes for periodic review of his case during the term of commitment. Art. 31B, §§ 9-10; Welf. & Inst. Code, §§6316-17, 6327.

Finally, the possible burden on commitment proceedings of the imposition of the standard of reasonable doubt is substantial. Proof by a preponderance of the evidence is sufficient in a commitment case because the jury is in reality asked to confirm what is essentially a psychiatric diagnosis. The psychiatrists actually testify to their conclusions regarding the ultimate issue, status as a defective delinquent or a mentally disordered sex offender. The People's burden of persuasion ought to be no greater than the degree of assurance with which reputable psychiatrists express themselves. *See, People v. Valdez,* 260 Cal. App. 2d 895, 904 [67 Cal. Rptr. 583] (1968). Referring to the psychiatric technique of evaluating defective delinquency, Dr. Manfred Guttmacher has observed that "our diagnostic skills are not

so exact that we can be certain." (Joint Record Extract, p. 177[5]). Absent certainty, we must deal with probability, and probability within scientific theory cannot be measured by the standard of reasonable doubt.

As stated in the recent case of *In re Winship, supra,* 397 U.S. 358, 363 (1970), dealing with juvenile proceedings:

> "The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error."

Facts, not probabilities, are clearly available in a juvenile delinquency proceeding based upon the commission of a crime, and the application of the standard of proof beyond a reasonable doubt in such a case "will not compel the States to abandon or displace any of the substantive benefits of the juvenile process." *In re Winship, supra,* at 367; *In re Gault,* 387 U.S. 1, 21 (1967).

This conclusion cannot be made in defective delinquency or mentally disordered sex offender proceedings, however. Requiring the States to meet a standard of proof which exceeds that degree of assurance with which reputable psychiatrists express themselves will compel the States to abandon or displace the substantive benefits of protection of society and treatment of the individual. Furthermore, if the State is unable to meet a higher standard of proof, the alternative to treatment of the defective delinquent is imprisonment on his criminal conviction.

---

[5]Appendix submitted in *Director v. Daniels,* 243 Md. 16, [221 A.2d 397] (1966).

Conclusion

For the foregoing reasons *amicus curiae* State of California joins respondent State of Maryland in urging that the judgment of the United States Court of Appeals for the Fourth Circuit be affirmed.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General,

HERBERT L. ASHBY,
Chief Assistant Attorney General
—Criminal Division,

WILLIAM E. JAMES,
Assistant Attorney General—
Appeals Section,

RUSSELL IUNGERICH,
Deputy Attorney General,

WILLIAM R. POUNDERS,
Deputy Attorney General,

Attorneys for Amicus Curiae
State of California.

APPENDIX

Applicable Provisions of California's Welfare and Institutions Code

§ *6300. Definitions*

As used in this article, "mentally disordered sex offender" means any person who by reason of mental defect, disease, or disorder, is predisposed to the commission of sexual offenses to such a degree that he is dangerous to the health and safety of others. Wherever the term "sexual psychopath" is used in any code, such term shall be construed to refer to and mean a "mentally disordered sex offender." (Added Stats.1967, c. 1667, p. 4107, § 37, operative July 1, 1969.)

§ *6302. Certification for hearing and examination after conviction*

(a) General provisions; failure to register under Penal Code § 290.

(a) When a person is convicted of any criminal offense, whether or not a sex offense, the trial judge, on his own motion, or on motion of the prosecuting attorney, or on application by affidavit by or on behalf of the defendant, if it appears to the satisfaction of the court that there is probable cause for believing such a person is a mentally disordered sex offender within the meaning of this chapter, may adjourn the proceeding or suspend the sentence, as the case may be, and may certify the person for hearing and examination by the superior court of the county to determine whether the person is a mentally disordered sex of-

fender within the meaning of this article. Conviction upon a charge of violation of Section 290 of the Penal Code by failure to register as required thereby is conviction of a criminal offense within the meaning of this subdivision.

* * *

§ *6315. Hearing; findings; return to original court*

If, upon the hearing, the person is found by the superior court not to be a mentally disordered sex offender, the superior court shall return the person to the court in which the case originated for such disposition as that court may deem necessary and proper.

(Added by Stats. 1967, c. 1667, p. 4107, § 37, operative July 1, 1969. Amended by Stats. 1970, c. 685, p. 1313, § 2.)

§ *6316. Return to criminal court for further disposition or commitment to hospital for care or treatment*

If, after examination and hearing, the court finds that the person is a mentally disordered sex offender and that the person could benefit by treatment in a state hospital, the court in its discretion has the alternative to return the person to the criminal court for further disposition or may make an order committing the person to the department for placement in a state hospital for an indeterminate period and a copy of such commitment shall be personally served upon said person within five days after the making of such order.

If after examination and hearing, the court finds that the person is a mentally disordered sex offender but will not benefit by care or treatment in a state

hospital the court shall then cause the person to be returned to the court in which the criminal charge was tried to await further action with reference to such criminal charge. Such court shall resume the proceedings and shall impose sentence or make such other suitable disposition of the case as the court deems necessary. If, however, such court is satisfied that the person is a mentally disordered sex offender but would not benefit by care or treatment in a state hospital it may recertify the person to the superior court of the county. The superior court may make an order committing the person for an indefinite period to the Department of Mental Hygiene for placement in a state institution or institutional unit for the care and treatment of mentally disordered sex offenders, designated by the court and provided pursuant to Section 6326. (Added by Stats.1967, c. 1667, p. 4107, § 37, operative July 1, 1969. Amended by Stats. 1970, c, 685, p. 1313, § 3.)

§ *6317. Progress reports*

If the court orders the commitment of the person to the department for placemnet in a state hospital for an indeterminate period, the court may, in the order of commitment, require the superintendent of the state hospital to make periodic reports to the court concerning the person's progress towards recovery.

(Added Stats.1967, c. 1667, p. 4107, § 37, operative July 1, 1969.)

§ *6325. Certification as to recovery; return to court; probation; credit for hospitalization time*

Whenever a person who is committed for an indeterminate period to the department for placement in a

state hospital as a mentally disordered sex offender (a) has been treated to such an extent that in the opinion of the superintendent the person will not benefit by further care and treatment in the hospital and is not a danger to the health and safety of others, or (b) has not recovered, and in the opinion of the superintendent the person is still a danger to the health and safety of others, the superintendent of the hopital shall file with the committing court a certification of his opinion under (a) or (b), as the case may be, including therein a report, diagnosis and recommendation concerning the person's future care, supervision or treatment. If the opinion so certified is under (a) the committing court shall forthwith order the return of the person to said committing court and shall thereafter cause the person to be returned to the court in which the criminal charge was tried to await further action with reference to such criminal charge.

Such court shall resume the proceedings, upon the return of the person to the court, and after considering all the evidence before it may place the person on probation for a period of not less than five years if the criminal charge permits such probation and the person is otherwise eligible for probation. As a condition of such probation the person shall totally abstain from the use of alcoholic liquor or beverages. In any case, where the person is sentenced on a criminal charge, the time the person spent under indeterminate commitment as a mentally disordered sex offender shall be credited in fixing his term of sentence.

(Added Stats.1967, c. 1667, p. 4107, § 37, operative July 1, 1969.)

§ 6326. *Certification of no recovery and continued menace*

Return to committing court.

If the opinion so certified is under subdivision (b) of Section 6325, the committing court shall forthwith order the return of the person to said committing court and shall thereafter cause the person to be returned to the court in which the criminal charge was tried to await further action with reference to such criminal charge.

Recertification and recommitment.

Such court shall resume the proceedings and after considering all the evidence before it shall impose sentence or make such other disposition of the case as the court may deem necessary and proper; provided, that said court, if satisfied that the person has not recovered from his mental disorder and is still a danger to the health and safety of others, may recertify the person to the superior court of the county. If said court after hearing makes a finding that the person is still a mentally disordered sex offender and is still a danger to the health and safety of others, it may make an order recommitting the person for an indeterminate period to the Department of Mental Hygiene for placement in a state institution or institutional unit for the care and treatment of such mentally disordered sex offenders designated by the court. At such hearing or hearings, the person shall be entitled to present witnesses in his own behalf, to be represented by counsel and to cross-examine any witnesses who testify against him.

Facilities for custodial care and treatment.

The Director of Mental Hygiene, with the approval of the Director of Corrections and the Director of Finance, may provide on the grounds of a state institution or institutions under the jurisdiction of the Department of Corrections or the Department of Mental Hygiene one or more institutional units to be used for the custodial care and treatment of mentally disordered sex offenders. Each such unit shall be administered in the manner provided by law for the government of the institution in which such unit is established.

Delivery to Institution; duration of confinement.

The court shall cause the person so recommitted to be delivered to the state institution or the institutional unit so designated. The person shall remain therein or in any other such institution or institutional unit to which he may be transferred by the Director of Mental Hygiene until the person is no longer a danger to the health and safety of others. Thereupon the proceedings set forth in Section 6325 shall be followed with respect to the certifying of an opinion to the committing court and the release of the person thereby.

(Added Stats.1967, c. 1667, p. 4107, § 37, operative July 1, 1969.)

§ *6327. Person committed for indeterminate period; report, return to court; hearing; recommitment; subsequent hearings; recovery and return to criminal court*

After a person has been committed for an indeterminate period to the department for placement in a state hospital as a mentally disordered sex offender

and has been confined for a period of not less than six months from the date of the order of commitment, the committing court may upon its own motion or on motion by or on behalf of the person committed, require the superintendent of the state hospital to which the person was committed to forward to the committing court, within 30 days, his opinion under (a) or (b) of Section 6325, including therein a report, diagnosis and recommendation concerning the person's future care, supervision, or treatment. After receipt of the report, the committing court may order the return of the person to the court for a hearing as to whether the person is still a mentally disordered sex offender within the meaning of this article.

The hearing shall be conducted substantially in accordance with Section 6306 to 6314, inclusive. If, after the hearing, the judge finds that the person has not recovered from his mental disorder and is still a danger to the health and safety of others, he shall order the person returned to the Department of Mental Hygiene under the prior order of commitment for an indeterminate period, or, if the opinion of the superintendent of the state hospital was under (b) of Section 6325, he may make and sign an order recommitting the person for an indeterminate period to the Department of Mental Hygiene for placement in a state institution or institutional unit for the care and treatment of such mentally disordered sex offenders designated by the court and provided pursuant to Section 6326. A subsequent hearing may not be held under this section until the person has been confined for an additional period of six months from the date of his return to the department. If the court finds that the person has recovered from his mental disorder to such an extent that he is

no longer a danger to the health and safety of others, or that he will not benefit by further care and treatment in the hospital and is not a danger to the health and safety of others, the committing court shall thereafter cause the person to be returned to the court in which the criminal charge was tried to await further action with reference to such criminal charge.

(Added Stats. 1967, c. 1667, p. 4107, § 37, operative July 1, 1969.)

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAR 23 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-5276

ALBERT D. MUREL, *et al.*,
Petitioners,

v.

BALTIMORE CITY CRIMINAL COURT, *et al.*,
Appellees.

REPLY BRIEF OF PETITIONERS

KARL G. FEISSNER
WILLIAM L. KAPLAN
THOMAS P. SMITH
FRED R. JOSEPH
ANDREW E. GREENWALD
WALTER E. LAAKE, JR.

Feissner, Kaplan and Smith
6401 New Hampshire Avenue
Hyattsville, Maryland 20783

Attorneys for Petitioners

Washington, D. C. · THIEL PRESS · 202 · 393-0625

TABLE OF CONTENTS

ARGUMENT IN RESPONSE TO BRIEF OF APPELLEES:

I. The Defective Delinquent Act Applies to Nearly All Persons Tried For Any Criminal Offense 2

II. The Petitioners Have Not Misstated the Facts In Their Brief as Suggested by the State 3

III. The State Has Misconstrued the Philosophical Frame of Reference by Which this Case Was Decided In the United States District Court for the District of Maryland, and the United States Court of Appeals for the Fourth Circuit 5

IV. The Right of Habeas Corpus Does Not Apply as Fully as Suggested by the State 7

V. The Act Clearly Denies Equal Protection of the Law by Denying the Defective Delinquent the Right of Appeal, But that Right of Appeal Does, In Fact, Exist in All Other "Civil" Cases 8

VI. The State Has Misconstrued the Holding of *Specht v. Patterson*. 9

VII. The State Has Misunderstood the Holding of This Honorable Court In *State of Minnesota ex rel. Pearson v. Probate Court of Minnesota* 10

VIII. The Law of Maryland Clearly Provides a Punishment If a Suspected Defective Delinquent Cites the Fifth Amendment of the Constitution of the United States. 12

IX. The State, In Its Brief, Has Misunderstood the Statory Requirements of the Maryland Defective Delinquent Act as It Applies to Referrals for Examination . . . 13

X. The State, In Its Brief, Has Misconstrued the Views of the Courts of Maryland as to Any Duty of the State to Attempt to Supply Any Medical or Psychiatric Treatment 14

ONCLUSION 18

PPENDIX A 1a

TABLE OF AUTHORITIES

Page

Cases:

Baxstrom v. Herold, 383 U.S. 107, 15 L.Ed.2d 620, 86 S. Ct. 760 (1966) 7, 8

Bosley v. State of Maryland, ___ Md. App. ___, 286 A.2d 203 (1972) 13, 14

Brown v. Director of Patuxent Institute, 224 Md. 635, 165 A.2d 895 (1960) 8

Creswell v. Director of Patuxent Institute, 234 Md. 620, 198 A.2d 300 (1964) 16

Creswell v. Director of Patuxent Institute, 1 Md. App. 8, 226 A.2d 158 (1967) 9

Groppi v. Leslie, ___ U.S. ___, 30 L.Ed.2d 632, 92 S. Ct. ___ (1972) 14

In re Gault, 387 U.S. 1, 18 L.Ed.2d 527, 87 S. Ct. 1428 (1967) 12

Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 84 L.Ed. 744, 60 S. Ct. 523 (1940) 9, 10, 11, 12

Nason v. Superintendent of Bridgewater State Hospital, 233 N.E.2d 908 (Mass., 1968) 17

Papachristau v. Jacksonville, No. 70-5030, Supreme Court of the United States, February 24, 1972 11

Sas v. State of Maryland, 334 F.2d 506 (4th Cir., 1964) 6, 17

Sas v. State of Maryland, 255 F. Supp. 389 (D.C., Md. 1969) 5, 6, 8

Shields v. Director, 244 Md. 710, 224 A.2d 107 (1966) 16, 17

Specht v. Patterson, 386 U.S. 605, 18 L.Ed.2d 326, 87 S. Ct. 1209 (1967) 9, 10

State v. Musgrove, 241 Md. 521, 217 A.2d 247 (1966) 12, 14

Tippet v. Director of Patuxent Institution, 233 Md. 647, 197 A.2d 257 (1964) 15

Tippet v. State of Maryland, 436 F.2d 1153 (4th Cir., 1971) 6, 7, 17

United States v. Reese, 2 Otto 214 (1876), 92 U.S. 214, 221 . . . 14

United States ex rel. Gerchman v. Maroney, 355 F.2d 302 (3rd Cir., 1966) 10

United States ex rel. Schuster v. Herold, 410 F.2d 1071 (2nd Cir., 1969) 8, 16

Wise v. Director of Patuxent Institution, 1 Md. App. 418, 230 A.2d 692 (1967) 13, 14

Statutes:

Maryland Annotated Code (1971 Supp.), Article 5, Section 1 8

Maryland Annotated Code (1971 Supp.), Article 27
Section 689 2
Section 690 2

Maryland Annotated Code (1971 Supp.), Article 31 B, Defective Delinquency Act .....
Section 6 2
Section 10(b) 7
Section 10(c) 7
Section 11 ..... 8, 9
Section 15 2

Miscellaneous:

Bauer, "Patuxent Bucks Anti-Abuse Ruling," *The Washington Daily News*, Friday, March 10, 1972 17

Boslow, H.M.; Kohlmeyer, W.A., *The Maryland Defective Delinquency Law: An Eight Year Follow Up* (JA 4, 506-509) 4

Boslow, H.M.; Rosenthal, D.; Gliedman, L.H., *The Maryland Defective Delinquency Law* (JA 4, 501-503) 4

Kaufmann, *The Portable Nietzche*, Viking Press (N.Y., 1954) at 91 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-5276

ALBERT D. MUREL, *et al.*,

Petitioners,

v.

BALTIMORE CITY CRIMINAL COURT, *et al.*,

Appellees.

REPLY BRIEF OF PETITIONERS

The State, in its Brief, has taken advocating umbrage with certain factual assertions made by the Petitioners, as well as the Petitioners' efforts to properly place this cause in an appropriate judicial framework. Petitioners respectfully suggest that through balanced logistical mobility the State has misunderstood the record in the Court below, or misunderstood the total impact of the Defective Delinquent Law. The Petitioners respectfully answer the propositions as follows:

I.

THE DEFECTIVE DELINQUENT ACT APPLIES TO NEARLY ALL PERSONS TRIED FOR ANY CRIMINAL OFFENSE.

Under the provisions of the Defective Delinquent Act, in Section 6 thereof, it is stated that requests for examination may be made of any person coming under several categories, and the State has suggested, in its Brief, that this indicates a desire of the Legislature of Maryland to have it apply to only a select group of persons. Such is emphatically not the case.

Under the provisions of Article 27, Section 690 of the Annotated Code of Maryland, previously cited at page 23 of the Petitioners' Brief, it is seen that offenders in the State of Maryland are sentenced to the jurisdiction of the Department of Corrections and not to a particular institution. These provisions of Article 27, Section 690, apply in the District Courts, Trial Magistrate Courts, as well as the Courts of *nisi prius*, criminal jurisdiction at the Circuit Court level. It follows, therefore, that any and all misdemeanors and felonies in the State of Maryland are punishable by imprisonment in the penitentiary, if the Department of Corrections so determines under the provisions of Article 27, Section 689. Thus, it can be seen that the select class suggested by the State, as warranted under the provisions of Article 6 of the Defective Delinquent Act, does not exist and any misdemeanant can be recommended for Patuxent Institution whether it be a serious offense, or, indeed, a minor offense, and the State's proposition that the Act applies only to a recognizable class is without merit.

The Petitioners further contend that the amendments to Section 15 of the Act, which suggests that the Act is not to affect Magistrate's Courts, is inapplicable since, if the Defendant takes a trial by jury, then Section 15 is not applicable. This seems to suggest that as a punishment for taking a jury trial, the State can, if it wishes, send the Defendant to Patuxent Institution for examination. The Petitioners are

unaware of a proper proposition of law which allows or sustains such an extraordinary power of the State for defendants exercising the rather cherished right to trial by jury.

II.

THE PETITIONERS HAVE NOT MISSTATED THE FACTS IN THEIR BRIEF AS SUGGESTED BY THE STATE.

The Appellees contend, in its Brief, that the Maryland definition of a defective delinquent in no way depended on its validity in the use of such terms as "sociopaths" or "psychopaths." In fact, the State goes on to say that at the Patuxent Institution group therapy is the predominant modality since the Institution's experience shows that a defective delinquent does not relate well to the one-to-one relationship with a therapist. In fact, the testimony appearing at JA Md. 774-775 is that the "sociopath" does not relate well in the one-to-one relationship with the therapist but can derive more benefit from treatment in a group sitting. In addition, Dr. Guttmacher, in his testimony before the Circuit Court for Prince George's County, when asked whether or not a sociopath was a defective delinquent as defined by the Maryland Act, stated that if a sociopathy has manifested itself by repeated dagnerous criminal behavior, he is (JA Md. 166).

Petitioners in no way misconstrued the statements of Dr. Guttmacher regarding the effect of having an improper person as the head of the Patuxent Institution. Dr. Guttmacher stated that it is very important that you have a good Director of the Institution, because the Director sets the pattern and it would be possible to get some individual in who would be out of step with the whole institution and would want to go his own way. Continuing, Dr. Guttmacher stated that it would be very destructive if we had somebody with poor judgment, someone like that could do a lot of harm (JA Md. 267). This was important, Dr. Guttmacher related, because the Director of the Institution would be the person who was applying the law and interpreting it.

Appellees contend that the Petitioners misconstrued the statement from the "*Maryland Defective Delinquency Law*" (JA 4, 501-503). That article, written by the Director of the Patuxent Institution and others, leaves no room for misinterpretation when it states:

> "Since no individual can be reasonabley said to have achieved perfect emotional balance, *whatever that might mean*, we could presumably infer that every individual shows some degree of emotional unbalance." (JA 4, 501).

In addition, the articles goes on to state that it is possible that a disproportionately large segment of the criminal population may be referred for examination. (JA 4, 502). The point to be made here is not whether or not the Petitioners have misconstrued the statement from this article, the question is that there does exist the possibility that a disproportionately large percentage of the criminal population may be referred to the Patuxent Institution for examination. What may be done in practice at any particular point in time is irrelevant to the question of what may be done, and may happen. Again, the Director in that article went on to say that it was important that the Director maintain a continuous professional liaison with the courts in a constant attempt to clarify the psychiatric criteria of defective delinquency. The fact that the Director must maintain a continuous liaison to clarify the psychiatric criteria would seem to show that the definition is not definitive, as well as would relate back to the fears expressed by Dr. Guttmacher (JA Md. 166) regarding the person of the Director himself.

Finally, Appellees argue that the Petitioners misconstrued the article, "*The Maryland Defective Delinquency Law; An Eight Year Follow-Up.*" (JA 4, 506-509). There is nothing in that article to be misconstrued. The Director, with candor, states that court testimony is a major and time-consuming part of the Institution's activities, citing that the Director alone has testified in nearly a thousand cases. (JA 4, 506). There is no misconception in the views that Dr. Boslow held when he wrote the article in question regarding juries. There

was nothing susceptible to being misconstrued about his statement that juries are susceptible to emotional appeals and have no feeling of responsibility. In addition, Dr. Boslow stated in that article that the Defective Delinquency Law had a dual purpose, i.e., to keep the emotionally disturbed and dangerous individuals out of circulation and to treat them when appropriate. (JA 4, 508). There is nothing that can possibly be misconstrued by the phrase that they should be treated when appropriate, therefore, removing from the role of mandatory treatment those who are at Patuxent for an indeterminate period of time whiling away the hours until they die.

While it is true that the enemy of society is crime and its causes and that everyone wants to see the problems of our criminal system alleviated, yet we must bear in mind and be wary and not fall prey to the words of Friedrich Nietzche:

> "How good bad music and bad reasons sound when one marches against an enemy." *Kaufmann, The Portable Nietzche.* Viking Press (N.Y., 1954), at 91.*

III.

THE STATE HAS MISCONSTRUED THE PHILOSOPHICAL FRAME OF REFERENCE BY WHICH THIS CASE WAS DECIDED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AND THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

It is noteworthy that the United States District Court for the District of Maryland, when considering this matter stated in its opinion:

> "This Court feels that the Fourth Circuit's concern (which was not and is not shared by the writer) is fully overcome in the *Daniels* Opinion." *Sas v. Maryland*, 295 F. Supp. 389, at 396.

---

*See Stone, Alan, A., M.D., *Discussion of Crime Prevention by the Indeterminate Sentence Law.* Appendix A attached.

It is patently obvious that the writer did not share the view of the United States Court of Appeals for the Fourth Circuit at the time its view was issued in the case of *Sas v. Maryland*, 334 F.2d 506 (4th Circ., 1964), and was not shared by him at the time that he heard the evidence in the Court below. It is an elementary principle of law that Constitutional rights and liberties are to be given a liberal interpretation and not a grudging interpretation.

Secondly the writer is of the opinion in the United States District Court for the District of Maryland at footnote 12 within his Opinion, after attempting to distinguish certain other cases, stated:

> "This Court can only be thankful that his family does not reside in the District of Columbia." *Sas v. Maryland*, 295 F. Supp. at 405-406.

Again, it is obvious that the writer of the Opinion in the United States District Court for the District of Maryland, entered the cause with a pre-determined view and used the hearing in the Court below as the basis for expounding his personal views, which, unfortunately, did not coincide with those of the United States Court of Appeals for the Fourth Circuit. Unfortunately, the Fourth Circuit, in its Opinion, stated:

> "We affirm on the District Court's opinion. *Sas v. State of Maryland*, District Court of Maryland, 295 F. Supp. 389." *Tippett v. Maryland*, 436 F.2d 1153 at 1155.

The Fourth Circuit then adopted the holdings of the United States District Court for the District of Maryland and did not answer any of the many contentions set forth by the Petitioners, but, rather, set forth general pleas for greater understanding in the field of penology, with which no one can necessarily disagree. Unfortunately, the learned Court did not seek to distinguish or discuss the many cases cited by Petitioners or the Amicus Curiae, and it was left to the

dissenting opinion to discuss some of the issues raised in the Petitioners' Brief. It follows, therefore, that the multitudinous citations by the State, in its present Brief, wherein they rely upon the opinion of the Fourth Circuit and the United States District Court of Maryland, are merely a propagation of misunderstanding, especially when one considers the view of the Fourth Circuit when it discussed the burden of persuasion and it stated:

> "However meaningful the distinction may be to us as Judges, however, it is greatly to be doubted that a jury's verdict would ever be influenced by the choice of one standard or the other." *Tippett v. Maryland*, 436 F.2d at 1158-1159.

It is rather obvious that the learned United States Court of Appeals for the Fourth Circuit is suggesting what has been suggested throughout these proceedings by the State, i.e., that we, the people, do not have sufficient sophistication and understanding to understand what a wonderful thing the State of Maryland is doing for us. This type of blue ribbon philosophy is abhorrent to a democratic government but consistent, perhaps, with enlightened despotism.[1]

IV.

THE RIGHT OF HABEAS CORPUS DOES NOT APPLY AS FULLY AS SUGGESTED BY THE STATE.

While it has always been admitted by the Petitioners that under the provisions of Section 10(c) of the *Act* that the right to petition for habeas corpus remains, it follows as clearly as day from night that application for further review as to the status of the defective delinquent can only be made every three (3) years. The *Act*, Section 10, Subparagraph B,

---

[1] The members of this Court must have chest puffing pride with the results of *Operation Baxstrom, United States ex rel. Schuster v. Herold*, 410 F.2d 1071, 1082 (2nd Cir., 1969).

Indeed, it has been specifically found in *Sas v. Maryland, Op. Cit.* and *Brown v. Director of Patuxent*, 224 Md. 635, 165 A.2d 895 (1960), that under the Maryland Law, a defective delinquent cannot raise the question of his defective delinquency on the merits in a habeas corpus proceedings. He may only challenge the question of whether, in fact, a valid judicial order was issued by a Court having jurisdiction. The right to question the jurisdiction of the Court is much less meaningful than the suggested proposition set forth by the State that the defective delinquent has the "right" of habeas corpus at any time; such is patently not the case.

V.

THE ACT CLEARLY DENIES EQUAL PROTECTION OF THE LAW BY DENYING THE DEFECTIVE DELINQUENT THE RIGHT OF APPEAL, BUT THAT RIGHT OF APPEAL DOES, IN FACT, EXIST IN ALL OTHER "CIVIL" CASES.

This Honorable Court in *Baxstrom v. Herold*, 383 U.S. 107, 15 L. Ed.2d 620, 86 S.Ct. 760 (1966), specifically held that the Petitioner in that cause was denied equal protection of the law by a procedure under which an individual could be civilly committed to an institution at the expiration of his sentence without a jury review available to other persons civilly committed in the State of New York.[2]

In the cause at Bar. it is noted that the right of appeal lies to the Court of Special Appeals or the Court of Appeals of Maryland (*Maryland Annotated Code*, Article 5, Section 1) from the vast majority of civil cases except the Defective Delinquent Law (Article 31B, Section 11, *Maryland Annotated Code*). Unbelievably, under the Defective Delinquent Law, the Court of Appeals of Maryland has specifically held that a Trial Judge has no authority to grant a Motion For

[2] "Baxstrom thus might be said to require the conclusion that, while prior criminal conduct is relevant to the determination whether a person is mentally ill and dangerous, it cannot justify denial of procedural safeguards for that determination." *U.S. ex rel. Schuster, Op. Cit.* at 1081.

New Trial or a Motion For Judgment, N.O.V., notwithstanding the fact that this exists in all other civil cases. *Creswell v. Director of Patuxent*, 1 Md. App. 8, 226 A.2d 158 (1967). When one recognizes that the Act itself, in Section 11, clearly says that the right of appeal shall be as a matter of grace and not of right, and yet the right of appeal lies for an ordinary property damage accident or breach of contract, it would seem unreal that the State of Maryland would suggest that all persons in the "civil" class are, in fact, being treated equally. This argument, in addition, does away with the State's proposition that *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 84 L.Ed. 744, 60 S.Ct. 523 (1940) is authority for the existing Act.

VI.

THE STATE HAS MISCONSTRUED THE HOLDING OF SPECHT v. PATTERSON

In *Specht v. Patterson*, 386 U.S. 605, 18 L.Ed.2d 326, 87 S.Ct. 1209 (1967), this Honorable Court held that the Colorado Sex Offenders Act was unconstitutional because of its procedures in allowing the Defendant to be convicted as a sex offender on the basis of a psychiatric report, which, interestingly enough, had to contain "recommendations as to whether or not the person is treatable." The Court specifically held that in view of the fact that the Colorado Sex Offenders Act makes one conviction the basis for commencing another proceedings to determine whether a person constitutes a threat of bodily harm to the public, or is a habitual offender or is mentally ill, is, in fact, *a new finding of fact* (emphasis supplied), and that, accordingly, in view of the fact that it was a new finding of fact the Defendant was entitled to the relevant protections which due process guarantees in the State criminal proceedings. This Court further held that he must be afforded all those safeguards which are fundamental rights and essential to a fair trial including, but not limited to, the rights to confront and cross-examine the witnesses against him.

This Court specifically held that the Defendant must have an opportunity to be heard, have an opportunity to be confronted with witnesses against him, have the right to cross-examine and to offer evidence of his own, and in addition, that there must be findings adequate to make meaningful any appeal that was allowed. The Court further properly distinguished *Minnesota ex rel. Pearson v. Probate Court, Op. Cit.*, and noted the enlightened views of the Court of Appeals of the Third Circuit Court in *U.S. ex rel. Gerchman v. Maroney*, 355 F.2d 302 (3rd Cir., 1966). In addition, this Court specifically held that the due process requirements, as measured by the Fourteenth Amendment to the Constitution of the United States, are applicable to State proceedings. It is respectfully suggested, therefore, that the distinguished and learned Attorney General of the sovereign State of Maryland has misconstrued or misunderstood the holdings of this Honorable Court in *Specht v. Patterson, Op. Cit.*

VII.

THE STATE HAS MISUNDERSTOOD THE HOLDING OF THIS HONORABLE COURT IN STATE OF MINNESOTA EX REL. PEARSON v. PROBATE COURT OF MINNESOTA.

This Court, in *State of Minnesota ex rel. Pearson v. Probate Court, Op. Cit.*, considered a state statute which specifically defines a psychopathic personality as one having a demonstrable sexual appetite grossly inappropriate for civilized living.

Firstly, the statute discussed by this Court, and discussed by the Supreme Court of Minnesota, was not triggered by a criminal conviction as is the statute in the Maryland Defective Delinquent Law.

Secondly, and of greater significance, perhaps, is the fact that under the Minnesota proceeding, there are critical provisions, before the proceedings are instituted; (1) the facts shall

first be submitted to the County Attorney, who, if he is satisfied that *good cause* exists, (2) shall prepare a petition to be executed by a person *having knowledge of the facts* and shall then present it to the Court. It is, of course, noted that under the Maryland law all that is required, under Paragraph 6D of the Act, is that the request for examination be filed with the Court,, stating the reasons "for *suspecting* or *supposing* the presence of defective delinquency." Compare *Papachristau v. Jacksonville*, No. 70-5030, Supreme Court of the United States, February 24, 1972, at page 13.

It is respectfully suggested by Petitioners that the State's proposition that *Minnesota ex rel. Pearson* supports the Maryland Act is beyond belief. In addition, once there is a finding of psychopathic personality under the Minnesota Act so as to require the care and treatment of the individual, that individual may appeal. In the State of Maryland, as previously suggested in Petitioners' Brief, the matter is wholly discretionary with a Court which has shown itself less than overly concerned with the Constitutional implications of the Defective Delinquent Law.

Again, the construction of the Minnesota statute by its learned Court required three elements; (1) an habitual course of misconduct in sexual matters; (2) an utter lack of power to control sexual impulses, and (3) facts or evidence showing the Petitioner would be likely to attack or otherwise inflict injury on objects of their uncontrolled and uncontrollable desire. This is patently different from a law which allows any person to be examined, and that individual has no right of appeal from the order to be examined, and then the definition is one of anti-social or criminal behavior, and one who is intellectually deficient or emotionally unbalanced. There is a vast sea of difference in a meaningful Constitutional sense between *Minnesota ex rel. Pearson* and the Defective Delinquent Law of Maryland.

The Petitioners respectfully but urgently suggest to this Court that the distinguished Attorney General of the sovereign State of Maryland has misconstrued or misunderstood

the holdings of this Court in *State of Minnesota ex rel. Pearson v. Probate Court, Op. Cit.*

VIII.

THE LAW OF MARYLAND CLEARLY PROVIDES A PUNISHMENT IF A SUSPECTED DEFECTIVE DELINQUENT CITES THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The State in its Brief has suggested that there are no sanctions against a proposed defective delinquent if he cites the Fifth Amendment of the Constitution of the United States. While it is respectfully suggested by the Petitioners that this has been answered in some fashion by the District Court when it found that the situation of Petitioner Avey was most disturbing, the Petitioners here would much rather meet the issue head on for the Petitioners are in strong agreement that in order for a Fifth Amendment privilege to be violated there must be some showing of compulsion against the individual seeking to take the Fifth Amendment. *In re Gault*, 387 U.S. 1, 18 L.Ed.2d 527 at 567, 87 S.Ct. 1428 (1967), (concurring opinion, White, J.). Accepting the proposition that there must, indeed, be compulsion, the Petitioners again would respectfully invite this Court's attention to *State v. Musgrove*, 241 Md. 521, 217 A.2d 247 (1966), which held that the prospective defective delinquent, if he cited the Fifth Amendment of the Constitution of the United States, could remain at the Patuxent Institution forever, or until such time as he decided to waive his Fifth Amendment privilege.

This becomes critically important in the Maryland proceedings for, as will be shown later, an individual who is recommended for Patuxent has no right to appeal the recommendation to Patuxent; he only has a right for *leave to appeal* after the determination is made by the Institution and at trial. Sufficeth to say at this point, that under the provisions of the *Act*, there is gross compulsion on a prospective defective delinquent under the holdings of *State v. Musgrove, Op. Cit.*, and cases decided since that time, which state that the individual will just remain in Patuxent forever until he waives his Fifth Amendment privilege.

IX.

THE STATE, IN ITS BRIEF, HAS MISUNDERSTOOD THE STATUTORY REQUIREMENTS OF THE MARYLAND DEFECTIVE DELINQUENT ACT AS IT APPLIES TO REFERRALS FOR EXAMINATION.

Under the Maryland Defective Delinquent Act, as we have suggested, any person convicted of any offense in the Circuit Court, or who is convicted in the Peoples Court and then takes an appeal *de novo* or jury trial to the Circuit Court, can be submitted to Patuxent for examination. This includes individuals convicted of the most minor and trivial offense since they could be sentenced to imprisonment in any of the institutions of the State of Maryland.

Nowhere under the Maryland procedures is an individual who is referred to Patuxent given the right to appeal that referral. Indeed, the Court of Special Appeals of Maryland has specifically held:

> "In any event we have heretofore held that an individual has an opportunity to contest his determination of defective delinquency but he has no statutory right to contest the order of the Judge that he undergo such an examination. See: *Wise v. Director*, 1 Md. App. 418." *Bosley v. State of Maryland*, ___ Md. App. ___, 286 A.2d 203 at 208, 209 (1972).

The *Bosley* and *Wise* cases clearly stand for the proposition that in Maryland no one has a right to contest an order of the Circuit Court referring a "supposed or suspected" individual to Patuxent for defective delinquency examination. The abuses that have, and could, take place in the future stretch the imagination of any free-thinking man to the breaking point. An individual convicted of unlawful assembly, who was protesting, perhaps, a political issue of the day; a civil rights advocate who delined to sit in the back of the bus; a housewife, if you will, speeding to the grocery store; all could be referred to Patuxent Institution for possible defective delinquency. There, they must sit until they waive their

rights of self-incrimination under the Fifth Amendment and then be examined, and if, in fact, the examination shows they are a defective delinquent, at that point they have a trial. If the examination shows they are not a defective delinquent, then the State of Maryland apologizes and they are released after first recognizing the folly of their ways in attempting to assert themselves in the State of Maryland.

Conversely, if the civil rights advocate, housewife or other citizen convicted of crime in the State of Maryland stands on the Bill of Rights, then, under *State v. Musgrove, Op. Cit.*, he will never be heard, and he will never have a right of trial, because under *State v. Musgrove, Op. Cit.*, he will stay until he does talk, and if he tries to make any appeal of the order referring him for examination, he is met with the clear holdings of *Bosley* and *Wise* to the effect that Maryland citizens have no right to contest the Order of the Court that a suspect undergo an examination for defective delinquency.

While one recognizes the salutary duty of the Attorney General of Maryland to advocate the cause of the people, it is urged that this cause includes the rights of all the people and the Petitioners respectfully suggest that the Attorney General has misconstrued the holdings of our Court, and misconstrued the scope and breadth of the Defective Delinquent Law as it pertains to referrals for examination.

Indeed, this Honorable Court, in *Groppi v. Leslie*, ___ U.S. ___, 30 L.Ed.2d 732, 92 S.Ct. ___ (1972), specifically held that due process requires, at a minimum, that deprivation of liberty be preceded by notice and opportunity for hearing appropriate to the nature of the case. In the case at Bar, this is sadly lacking.

> "Ir would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *United States v. Reese*, 2 Otto 214 at 221 (1876), 92 U.S. 214, 221.

X.

THE STATE, IN ITS BRIEF, HAS MISCONSTRUED THE VIEWS OF THE COURTS OF MARYLAND AS TO ANY DUTY OF THE STATE TO ATTEMPT TO SUPPLY ANY MEDICAL OR PSYCHIATRIC TREATMENT.

The State, in its learned Brief, has suggested that, statistics-wise, it can demonstrate that Patuxent, in its milieu therapy, offers some form of treatment to the unfortunates who find themselves confined within that Institution. The State, of course, has overlooked the *nisi prius* decision which found, as a fact, that only four individuals were receiving individual psychotherapy and has overlooked the testimony in the Court below and the documentary evidence that over one-third of the individuals in Patuxent, at the time of the original hearing in the Maryland Courts, were not receiving treatment. Indeed, this was corroborated, in part, by Dr. Boslow himself (JA. Md. 788).

If that, however, was not sufficient, certainly the Supreme Court of the United States should be aware of the holdings of the Court of Appeals of Maryland in the matter of *Tippett v. Director of Patuxent Institution*, 233 Md. 647, 197 A.2d 257 (1964). The Court may recall that Inmate Tippett is the one referred to in the original Brief of Petitioners as the inmate who was at the Institution for a number of years because he was stuttering and there was no person available to help him in his stuttering. It may be recalled further that Inmate Tippett had received less than zealous care for his rights by the Circuit Courts during his several hearings. Perhaps, the judicial coup d'etat of the State's position is found in the clear holding of the Maryland Court of Appeals in *Tippett v. Director, Op. Cit.*, as follows:

> "As to the stuttering there is no claim and no showing that it could be helped or cured by treatment and, in any event, a claim of denial of proper medical treatment has been held to be irrelevant to any cogent issue pertinent to a redetermination hearing." 197 A.2d 257 at 258.

If, in fact, whether or not any treatment is available is irrelevant, and if, in fact, the claim of denial of treatment is irrelevant, *Shields v. Director*, 244 Md. 710, 224A.2d 107 (1966), then, what, in the name of all that is holy, is, in fact, relevant under the Maryland law?[3] Certainly, there is only one clear view which has come from the Court of Appeals of Maryland and that is in *Creswell v. Director of Patuxent*, 234 Md. 620, 198 A.2d 300 (1964), which held that on redetermination hearings of defective delinquents there need be no new facts or new record to show any antisocial conduct, but the redetermination can be made solely on the basis that it is not reasonably safe for society to terminate the confinement or treatment; thus, the learned Attorney General and the sovereign State of Maryland have run a full circle. They have set up an Act which can apply to any citizen depending upon

---

[3]The horrible nature of Patuxent, while previously demonstrated in Petitioners' Brief, has been sidestepped with terpsichorean erudition by the State. They have again overlooked the hole (JA Md. 741), the fact that the majority of the "doctors" at the Institution were unlicensed men whose qualifications must, of necessity, be suspect (JA Md. 752); that the expertise of the Board of Review is highly questionable (JA Md. 758-760) and the vicious nature of sexual assaults and rampant homosexuality condoned by Patuxent (JA Md. 761-764) and then compare (JA 4, 147-154), decry the paternalistic attitude of the State of Maryland. Unfortunately, both lower Courts felt that testimony pertinent to the vicious nature of Patuxent might not be fully relevant (JA Md. 554, JA 4, 155). The gassings, beatings, "sensory deprivation" and other aspects of Patuxent's milieu therapy sustain Petitioners' assertion that in fact and in law Patuxent is a horrible mental institution. Those "twice cursed" and placed in confinement for the mentally ill, find new disabilities imposed on existing ones; this is well nigh destructive and calls for the closest scrutiny. *United States ex rel. Schuster v. Herold*, 410 F.2d 1071 (2 Cir., 1969). Alas,

> "Confined with those who are insane, told repeatedly that he too is insane, it does not take much for a man to question his own sanity and in the end succumb to some mental abberation." *Schuster* at 1078.

supposition or suspicion. The accuser need only "suspect or suppose" the presence of defective delinquency, and off the individual is shunted into a horrible[4] mental institution, where he has no hearing until there is a final determination of his mental condition. If, during the period of his examination, he indicates that he is a citizen of the United States of America and entitled to the protections of the Fifth Amendment of the Constitution of the United States, he then finds that he will remain in that Institution forever. If, in fact, he is found under the changing, linguistic tides of the Court of Appeals of Maryland to be a defective delinquent, and he is then placed in that Institution, he then finds for the first time that it is irrelevant whether he can be helped or whether treatment is available, *Shields v. Director, Op. Cit.*,[5] but that he will remain there until it is safe for society to allow him back into the human race. This, we submit, is a penal colony described by its inmates in the article hereinafter referred to as "the hotel of hell." *Washington Daily News, infra.*

The State has cited medical views which were not produced in the Courts below, or the subject of cross-examination. The Petitioners thus feel it appropriate that they, too, might cite that which was not brought to the attention of the Courts below, and the Petitioners' attention has been drawn to a newspaper of general circulation, *The Washington Daily News*, on Friday, March 10, 1972, at page 3, just five days before this Reply Brief was dictated. On page 3 thereof, under thy heading, "Patuxent Bucks Anti-Abuse Ruling," we find in the fourth paragraph the Assistant Director of Patuxent quoted as follows:

---

[4]Compare *Nason v. Bridgewater State Hospital*, 233 N.E.2d 908 (Mass. 1968).

[5]Interestingly enough, *Schuster* at 1088 says *Sas v. Maryland*, 334 F.2d 506, 509, holds a Constitutional right to treatment. *Tippett v. State of Maryland*, 436 F.2d 1153 (4th Cir., 1971), does not consider the issue worthy of comment except in the Dissent.

"I don't think they on the court have much respect for us and we certainly don't respect them."

If this is not poignant evidence of the fact that we have a super judiciary in the State of Maryland which is capable of the most cunning abuses known under the false face of rehabilitation, then the Petitioners do not know where else to turn.

It would seem, finally, in the sovereign State of Maryland that we, indeed, have the Bill of Rights, but stamped across the face of the Bill of Rights we find . . .

VOID WHERE PROHIBITED BY LAW.

CONCLUSION

The Petitioners respectfully adopt and incorporate herein by reference their conclusions in their original Brief.

KARL G. FEISSNER
WILLIAM L. KAPLAN
THOMAS P. SMITH
FRED R. JOSEPH
ANDREW E. GREENWALD
WALTER E. LAAKE, JR.

Attorneys for Petitioners
6401 New Hampshire Avenue
Hyattsville, Maryland 20783
270-2626

APPENDIX A

The system of indeterminate sentence described in this paper allows the court to sentence men to a term of one day to life in a total institution. This formidable sentence is passed not on the basis of acts committed, but on the basis of prediction of future danger to society. Thus an awesome power and responsibility falls to the psychiatric staff whose clinical judgment about future dangerous behavior becomes the crucial variable in the system of confinement. This follow-up study, with its glowing commentary buttressed by statistical data, suggests that Patuxent's predictive and treatment procedures work and should be and will be adopted elsewhere. This is the sort of dangerous therapeutic optimism and oversell for which an immediate antidote is appropriate.

First, the statistics demonstrate that of the 740 men labeled defective delinquent over an 11½ year period, Patuxent's staff recommended parole of 156, or roughly 20% who, having been "fully treated," had low recidivism rates. However, we are given no identifying characteristics of this highly selected sample. If, for example, it is composed of men over 45, recidivism comparisons may prove very little about the wisdom of the psychiatric staff, or the value of Patuxent's treatment methods. Later in the paper we learn that parole for this unidentified 20% does not mean complete release; indeed, parole means week-end furloughs, a work-out-live-in program, a study program, and a halfway house. Complete release was allowed to only 30 of the 99 parolees with no new offenses, and to an unknown number of the 57 with new offenses. If we assume an equal ratio of complete releases in the latter group, we find that after 11½ years, Patuxent has recommended that approximately 48 men go free, or less than 7% of the men originally labeled defective delinquent. For the other 13% parole may mean partial confinement.

What I wonder is the statistical significance derived from contrasting national or Maryland recidivism rates with

Patuxent's rates which depend on indeterminate, carefully supervised and restricted parole together with the threat of lifetime confinement?

One would expect that the value of Patuxent's treatment method would be reflected in the percentage of parolees committing new felonies, the more serious crimes. In fact, however, there is no difference between the treated and untreated groups in the percentage of felony offenders or in the percentage of crimes against person, including rape, robbery, and aggravated assault.

The final statistics presented in this paper are those deal with crimes prevented. We are told that Patuxent has definitely prevented at least 1,000 crimes, but the fact is that if everyone had simply been confined permanently, several hundred other crimes could have been prevented.

The critical problem is not and never has been one of finding ways to prevent crimes by former offenders. Since we know that 65% of the men who leave our prisons will be recidivists, we need only keep everyone in prison. In 11½ years we would have prevented millions of crimes without the help of psychiatrists, psychologists, or social workers. We have not taken such action because the critical problem is to prevent crimes while maintaining constitutional rights in a free society.

The statutes which legitimate Patuxent and its methods suggest that psychiatric predictions of dangerousness are a sufficiently reliable and valid foundation on which to build a system of justice. Surely all of us recognize that the clinician's predictive skills do not merit such a grave responsibility, nor do Dr. Hodge's findings in their present form provide support for such a responsibility being deputized to psychiatry.

I must note that nowhere in this paper is there recognition of these fundamental questions, nor is there any mention of the most serious scientific problem of prediction; namely, false positives.

Dr. Hodge, ignoring the scientific and the moral problems, writes: "I predict that 20 years hence historians of psychiatry will regard this statute as one of the major accomplishments of the middle third of the twentieth century." This prediction can only prove correct if in the interim 1984 turns out to be Orwell's 1984. The Maryland statute is unique as Dr. Hodge suggests in that its wording allows the state to hold people thought to be dangerous. Other states, however, achieve the same result by alternative methods; many create some form of civil commitment like Maryland's in which criminal defendants are deprived of freedom without the protections the law usually allows. The rationale for this is that defendants in these instances are not being punished, but treated; not for what they did, but for what they will do. Until we can demonstrate that treatment for the defective delinquent in fact exists, and that the capacity to predict dangerousness exists as well, we cannot encourage government to create more Patuxents.

Syllabus

MUREL ET AL. v. BALTIMORE CITY CRIMINAL COURT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 70-5276. Argued March 28-29, 1972—Decided June 19, 1972

In this habeas corpus challenge to the constitutionality of Maryland's Defective Delinquency Law made by petitioners, who were convicted of various state crimes and committed to Patuxent Institution for indeterminate periods, *held* that the writ of certiorari must be dismissed as improvidently granted, since one of the petitioners has been unconditionally released, and the others are subject to unexpired sentences barring their release even if their claims prevailed (cf. *McNeil* v. *Director, Patuxent Institution*, *ante*, p. 245); moreover, petitioners' challenge to one Defective Delinquency Law should be considered in relation to other state laws regarding civil commitment for compulsory psychiatric treatment, *Baxstrom* v. *Herold*, 383 U. S. 107, and those laws are now being substantially revised to afford greater safeguards to committed persons.

436 F. 2d 1153, certiorari dismissed as improvidently granted.

Karl G. Feissner and *Andrew E. Greenwald* argued the cause for petitioners. With them on the brief were *William L. Kaplan* and *Thomas P. Smith*.

Henry R. Lord, Deputy Attorney General of Maryland, argued the cause for respondents. With him on the brief were *Francis B. Burch*, Attorney General, and *Edward F. Borgerding* and *Donald R. Stutman*, Assistant Attorneys General.

Evelle J. Younger, Attorney General, *Herbert L. Ashby*, Chief Assistant Attorney General, *William E. James*, Assistant Attorney General, and *Russell Iungerich* and *William R. Pounders*, Deputy Attorneys General, filed a brief for the State of California as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed by *Alan F. Charles* for the National Legal Program on Health Problems of the Poor, and by *Curtis R. Reitz* and *Julian Tepper* for the Prison Research Council of the University of Pennsylvania Law School.

PER CURIAM.

Petitioners were convicted of various state crimes and sentenced to fixed terms of imprisonment. They were then committed to the Patuxent Institution in lieu of sentence, for an indeterminate period, pursuant to the Maryland Defective Delinquency Law, Md. Ann. Code, Art. 31B. They sought federal habeas corpus, challenging on constitutional grounds the criteria and procedures that led to their commitment, and the conditions of their confinement. They contend, *inter alia*, that the statutory standard for commitment is impermissibly vague, that they are entitled to put the government to the burden of proof beyond a reasonable doubt, that at the compulsory psychiatric examination prescribed by the statute they were entitled to have the assistance of counsel and to invoke the privilege against self-incrimination, and that they are being denied a constitutional right to treatment. The District Court denied relief *sub nom. Sas* v. *Maryland*, 295 F. Supp. 389 (Md. 1969), and the Court of Appeals affirmed *sub nom. Tippett* v. *Maryland*, 436 F. 2d 1153 (CA4 1971).[1] We granted certiorari, 404 U. S. 999

[1] Petitioner Murel was originally committed as a defective delinquent in 1962, and Creswell in 1958; their separate petitions for federal habeas corpus were denied without hearing in 1963. On appeal, the Court of Appeals consolidated these and other similar cases, and remanded all of them for a hearing, *sub nom. Sas* v. *Maryland*, 334 F. 2d 506 (CA4 1964). The hearing was deferred, by agreement of the parties, pending the outcome of related litigation in the state courts, which culminated in the decision in *Director* v. *Daniels*, 243 Md. 16, 22. A. 2d 397, cert. denied *sub nom. Avey* v. *Boslow*, 385

(1971), to consider whether, and to what extent, the constitutional guarantees invoked by petitioners apply to this kind of commitment process. After briefing and oral argument, it now appears that this case does not present these issues in a manner that warrants the exercise of the certiorari jurisdiction of this Court.

1. Of the four petitioners, one has been unconditionally released from confinement, and the other three are subject to criminal sentences that have not yet expired, and that would bar their release from custody even if their claims were to prevail.[2] This fact, while not necessarily dispositive of all the claims presented by these petitioners, casts those claims in a different light, not contemplated by our original grant of the writ.[3] Cf. *McNeil* v. *Director, Patuxent Institution*, *ante*, p. 245.

2. Under our decisions in *Baxstrom* v. *Herold*, 383 U. S. 107 (1966), *Humphrey* v. *Cady*, 405 U. S. 504 (1972), and *Jackson* v. *Indiana*, 406 U. S. 715 (1972), petitioners' challenge to the Maryland Defective Delinquency Law should be considered in relation to the

---

U. S. 940 (1966). The federal habeas hearing was then held in the consolidated cases, which by this time also included that of petitioners Hayes and Avey, who had been committed after the Court of Appeals' remand order. The petitions were again denied, 295 F. Supp. 389 (Md. 1969), and the Court of Appeals affirmed, 436 F. 2d 1153 (CA4 1971).

[2] At the start of this litigation eight years ago both Murel and Creswell were subject to confinement that was wholly attributable to the Defective Delinquency Law, their sentences having expired. This is no longer the case because Murel was recently released, and Creswell was convicted and sentenced on new charges. We therefore do not reach their claims.

[3] We do not suggest that these cases are moot, or that a case or controversy is lacking, or that habeas corpus is inappropriate to test the special incidents, if any, of these defective-delinquency confinements. See *Carafas* v. *LaVallee*, 391 U. S. 234 (1968); *Jones* v. *Cunningham*, 371 U. S. 236 (1963); *North Carolina* v. *Rice*, 404 U. S. 244, 248 (1971).

criteria, procedures, and treatment that the State of Maryland makes available to other persons, not "defective delinquents," committed for compulsory psychiatric treatment. We are informed that the statutes governing civil commitment in Maryland are presently undergoing substantial revision, designed to provide greater substantive and procedural safeguards to committed persons. Accordingly, it seems a particularly inopportune time for this Court to consider a comprehensive challenge to the Defective Delinquency Law.

In these circumstances, the writ of certiorari is therefore dismissed as improvidently granted.

MR. JUSTICE DOUGLAS, dissenting.

Patuxent Institution is a special prison used by the State of Maryland for the incarceration of "defective delinquents." Individuals who have demonstrated "persistent aggravated anti-social or criminal behavior," who have "a propensity toward criminal activity," and who have "either such intellectual deficiency or emotional unbalance" as to present "an actual danger to society" may be confined at Patuxent. Md. Ann. Code, Art 31B, § 5 (1971). The initial determination that one is a defective delinquent is made judicially and, for those confined to Patuxent after such a determination, there is the right to seek judicial redetermination of their status at three-year intervals. *Id.*, § 6 *et seq.* One of the objectives of Patuxent supposedly is to provide treatment for the inmates so that they may be returned to society. *Director* v. *Daniels*, 243 Md. 16, 31–32, 221 A. 2d 397, 406 (1966). Should a defective delinquent not receive treatment, or should the treatment prove inadequate to return him to society, the inmate might well remain in Patuxent for the remainder of his life. See *McNeil* v. *Director, Patuxent Institution*, *ante*, p. 245.

Petitioners brought this action in the District Court challenging various aspects of their confinement at Patuxent. The District Court denied relief, *Sas* v. *Maryland*, 295 F. Supp. 389 (Md. 1969); the Court of Appeals affirmed, *Tippett* v. *Maryland*, 436 F. 2d 1153 (CA4 1971); and we granted the petition for a writ of certiorari. 404 U. S. 999. Because I base my decision on narrow grounds, I do not reach the broader issues tendered by petitioners.

When a State moves to deprive an individual of his liberty, to incarcerate him indefinitely, or to place him behind bars for what may be the rest of his life, the Federal Constitution requires that it meet a more rigorous burden of proof than that employed by Maryland to commit defective delinquents. The Defective Delinquency Act does not specify the burden of proof necessary to commit an individual to Patuxent, but the Maryland Court of Appeals has determined that the State need only prove its case by the "fair preponderance of the evidence." *E. g., Crews* v. *Director*, 245 Md. 174, 225 A. 2d 436 (1967); *Termini* v. *Director*, 243 Md. 689, 221 A. 2d 658 (1966); *Dickerson* v. *Director*, 235 Md. 668, 202 A. 2d 765 (1964); *Purks* v. *State*, 226 Md. 43, 171 A. 2d 726 (1961); *Blizzard* v. *State*, 218 Md. 384, 147 A. 2d 227 (1958); and see *Sas* v. *Maryland*, 334 F. 2d 506 (CA4 1964); *Walker* v. *Director*, 6 Md. App. 206, 250 A. 2d 900 (1969). Petitioners have thus been taken from their families and deprived of their constitutionally protected liberty under the same standard of proof applicable to run-of-the-mill automobile negligence actions.[1]

[1] In petitioner Murel's redetermination hearing on December 21, 1964, for example, the trial court instructed the jury: "The burden is on the State to prove by a preponderance of evidence, as I have

The Court of Appeals disapproved this standard but, because it felt it insignificant, nonetheless held it to be consistent with the requirements of the Due Process Clause:

"We might all be happier had [the burden of persuasion] been stated in terms of clear and convincing proof rather than in terms of a preponderance of the evidence. However meaningful the distinction may be to us as judges, however, it is greatly to be doubted that a jury's verdict would ever be influenced by the choice of one standard or the other. We all know that juries apply the preponderance standard quite flexibly, depending upon the nature of the case. In any event, in the present state of our knowledge, choice of the standard

---

stated to you, that the defendant does come within all phases of the definition of a defective delinquent." Trial Transcript 70.

The jury instructions in petitioner Creswell's December 20, 1961, redetermination trial were similar:

"The burden of proof in this particular case is governed by our normal civil rules of evidence. The burden of proof is on the State to satisfy you that this defendant is a defective delinquent. If the State has not satisfied you by a fair preponderance of the evidence that he is a defective delinquent, or if your minds are in a state of equal balance, or even balance, after considering all the evidence as to whether he is or is not a defective delinquent, then it is your duty to find him to be not a defective delinquent.

"However, if you are satisfied by a fair preponderance of the evidence that he is a defective delinquent, then it is your duty to so find him to be such defective delinquent." Trial Transcript 75–76.

The record developed in the District Court also included the jury instructions in the October 30, 1959, redetermination hearing of Charles Tippett, who was a petitioner in the District Court:

"The Court informs you that having once been determined to be a defective delinquent and now that he comes before you and asks to be released as cured of whatever defect there was, the burden is on him to convince you by a fair preponderance of the testimony that that is so." Trial Transcript 40.

of proof should be left to the state. A legislative [*sic*] choice of the preponderance standard, the same standard governing civil commitments of mentally ill persons who have no history of criminality, ought not to be held in violation of due process requirements when we have no firm foundation for an evaluation of the practical effects of the choice." *Tippett* v. *Maryland*, *supra*, at 1158–1159.

Judge Sobeloff dissented in part and would have held the State to a more stringent burden:

"The reasonable doubt standard is indispensable in both criminal and juvenile proceedings . . . for 'it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.' . . .

"The objections to the preponderance standard apply with equal force in defective delinquency hearings—indeed they are even more compelling in the latter class of cases, since indefinite incarceration is at stake. Due process commands that the jury must be satisfied beyond a reasonable doubt as to all objective facts in dispute, including the truth of any alleged incidents relied upon by the psychiatrists in reaching their recommendation." *Id.*, at 1165 (citations omitted).

In considering the constitutionally mandated burdens of proof applicable to particular types of cases, our decisions have attached greater significance to the varying standards than did the Court of Appeals below. In *Speiser* v. *Randall*, 357 U. S. 513, 520–521 (1958), we said:

"To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed

construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights."

And see *In re Winship*, 397 U. S. 358, 368 (1970) (Harlan, J., concurring).

The reason for our continued concern over the applicable burden of proof is that a lawsuit—like any other factfinding process—is necessarily susceptible of error in the making of factual determinations. The nature of the rights implicated in the lawsuit thus determines the allocation and degree of the burden of proof and consequently the party upon whom the risk of errors in the factfinding process will be placed. We applied this reasoning in *Speiser*, where First Amendment rights were implicated:

"In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome. There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt." *Id.*, at 525–526 (citations omitted).

In *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971), MR. JUSTICE BRENNAN, in an opinion joined by THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN, again applied these principles and reasoned that the important First Amendment interests present in defamation actions required plaintiffs to meet an extraordinary burden of proof. JUSTICE BRENNAN said, "In libel cases . . . an erroneous verdict for the plaintiff [is] most serious. . . . [T]he possibility of such error . . . would create a strong impetus toward self-censorship which the First Amendment cannot tolerate." *Id.*, at 50. MR. JUSTICE BRENNAN thus concluded that a more rigorous burden of proof was necessary to safeguard the important First Amendment rights involved:

> "We . . . hold that a libel action . . . by a private individual against a licensed radio station for a defamatory falsehood in a newscast relating to his involvement in an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 52.

In re Winship, supra, dealt with an individual's personal liberty which we had characterized as "an interest of transcending value" in *Speiser*, 357 U. S., at 525. There, we determined that "proof beyond a reasonable doubt" was constitutionally required "because of the possibility that [an individual might] lose his liberty" and because of the stigma of a criminal conviction. 397 U. S., at 363. And see *Woodby* v. *Immigration and Naturalization Service*, 385 U. S. 276, 285 (1966).

In the present case, petitioners were deprived of their most basic right—their personal liberty—under a burden of proof which was constitutionally inadequate. The

right to liberty is one of transcendent value. Without it, other constitutionally protected rights such as the right of free expression and the right of privacy become largely meaningless. Yet Maryland has deprived petitioners of this right, using a burden of proof which fails to give sufficient weight to the interests involved.

It is no answer to say that petitioners' commitments were in "civil" proceedings and that the requirement for proof beyond a reasonable doubt is required only in "criminal" cases. *In re Gault*, 387 U. S. 1 (1967), and *In re Winship*, *supra*, specifically rejected this distinction and looked instead at the interests involved and the actual nature of the proceedings. See also *Baxstrom* v. *Herold*, 383 U. S. 107 (1966); *Specht* v. *Patterson*, 386 U. S. 605 (1967). Nor would it be persuasive to argue that the difficulty in proving one's state of mind requires that the State be afforded the benefit of a lesser burden of proof. Proving a state of mind is no more difficult than many other issues with which courts and juries grapple each day.[2] An individual who is confronted with

---

[2] Bruce J. Ennis, Staff Attorney of the New York Civil Liberties Union and Director of the Civil Liberties and Mental Illness Project, testified as follows before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st & 2d Sess., 277–278 (1969 and 1970):

"As I mentioned earlier, the mentally ill are possibly less dangerous than the mentally healthy. A [illegible]e and a half year study of 5,000 patients discharged from New York State mental hospitals showed that 'patients with no record of prior arrest have a strikingly low rate of arrest after release. . . . Their over-all rate of arrest is less than 1/12 that of the general population and the rate for each separate offense is also far lower, especially for more serious charges.' Another psychiatrist states that there is 'not a shred of evidence that the mentally ill are any more dangerous than the mentally healthy.' A diagnosis of mental illness tells us nothing about whether the person so diagnosed is or is not dangerous. Some mental patients are dangerous, some are not. Perhaps the psychiatrist is an expert at deciding whether a person is mentally ill, but is he an expert at predicting

the possibility of commitment, moreover, runs the risk of losing his most important right—his liberty.

Speiser and *Winship* indicate that an individual's personal liberty is an interest of transcending value for the deprivation of which the State must prove its case beyond a reasonable doubt. I would follow established precedent and hold that a State may not subject individuals to lengthy—if not indefinite—incarceration under a lesser burden of proof. Accordingly, I would reverse the judgment below.

---

which of the persons so diagnosed are dangerous? Sane people, too, are dangerous, and it may legitimately be inquired whether there is anything in the education, training or experience of psychiatrists which renders them particularly adept at predicting dangerous behavior. Predictions of dangerous behavior, no matter who makes them, are incredibly inaccurate, and there is a growing consensus that psychiatrists are not uniquely qualified to predict dangerous behavior and are, in fact, less accurate in their predictions than other professionals.

"Because predictions of dangerous behavior are so grossly unreliable, we should authorize confinement only if the predicted danger is proved 'beyond a reasonable doubt' rather than by a mere preponderance of the evidence." (Footnotes omitted.)